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SAMPLE DECLINE LETTER

June 22, 1999

Ms. Jane Doe
First Street
Hometown, WA 98000

RE: State/City v. John Doe, Case No. 3443

Dear Ms. Doe:

This letter is to inform you that the Prosecutor's Office has made a decision not to file criminal charges in the above-noted matter. This decision was made carefully and in accordance with office policy and charging guidelines. A decision not to file charges does not mean we concluded that no crime was committed. Accordingly, it would be inappropriate for this letter, or the fact of the decline, to be used in any other court proceeding to suggest or imply that this office has made a determination that these allegations are unfounded. The prosecutor must consider many factors in making a decision as to whether to file criminal charges.

If you have any questions about how this decision was reached or the factors considered, please call me at 123/456-7890.

Very truly yours,

Deputy Prosecuting Attorney

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

Check the box that applies to this statement:

- 1. I wrote this statement in my own handwriting.
- 2. I orally provided the officer with this statement and the officer wrote down what I said.
- 3. I orally provided the officer with this statement and the officer made a tape recording of what I said. I gave the officer permission to tape-record the statement.

I have read, or have had read to me, each page of this statement which consists of _____ pages. I have signed each page of the statement and placed my initials next to any corrections I have made. I understand that this statement may be used in a court of law and may be used by a judge in determining the existence of probable cause for any charges that may be filed as a result of the described incident. This statement is truthful and accurate; and was made voluntarily, knowingly, and intelligently, without any threats or promises of any kind.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED this _____ day of _____, 19_____.

Signature of Declarant

Signature of Witness to Statement

SMITH AFFIDAVIT FORM 2

STATE OF WASHINGTON)

: ss.

COUNTY)

_____ BEING FIRST DULY SWORN ON OATH, DEPOSES AND SAYS:

That I am the person who gave the attached statement of ___ pages, dated _____. I have read the attached statement or it has been read to me and I know the contents of the statement. I believe that the statement is a true and accurate statement of the facts of this case. The attached statement is, by this reference, incorporated and made a part of this affidavit.

I further understand that this affidavit is made under oath and truthfully reflects all the facts within my knowledge. I also understand that this affidavit may be used in a court of law.

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

I further acknowledge that giving a false statement which affects a criminal proceeding is the crime of false swearing, a gross misdemeanor, and that I may be charged with that crime if I give a materially false statement.

_____ Signed at: _____

SUBSCRIBED AND SWORN to before me
this ___ day of _____, _____

NOTARY PUBLIC in and for the State of Washington
residing at _____.
My commission expires: _____.

IN THE _____ COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

NO.

Plaintiff,

WAIVER OF EXTRADITION

vs.

_____,'

Defendant.

The defendant, _____, having first been properly charged with a crime or having been convicted of a crime in the above-entitled cause number, agrees that in consideration of being granted release prior to trial and/or release prior to sentencing and/or granted a furlough from custody and/or granted permission to leave the State of Washington and/or granted release pending appeal, hereby agrees to waive extradition to the State of Washington from any state or territory of the United States or from the District of Columbia or from any other point outside of the State of Washington should it be the case that I am found outside of the State of Washington and am subject to return to stand trial in this matter or to serve a sentence imposed in this matter or to address any alleged violations of any conditions of the probation and/or sentence imposed in this matter. I also agree that I will not contest any effort to return me to the State of Washington. I make this waiver of extradition freely, voluntarily and without compulsion. No one has threatened harm of any kind to me or any other person to cause me to make this waiver. No person has made promises of any kind to cause me to make this waiver, except as set forth in this agreement. I have been informed and fully understand that by waiving extradition, I am waiving the following rights: (a) the right to issuance and service of a warrant of extradition; (b) the right to obtain a writ of habeas corpus under RCW 10.88.290 or another state's version of the Uniform Criminal Extradition Act; (c) the right to counsel with respect to extradition proceedings; and (d) the opportunity to petition the executive of the asylum state for relief from extradition. I have also been informed and fully understand that once I sign this agreement, the waiver of extradition is irrevocable.

Attorney for Defendant
WSBA No.

Defendant

The foregoing waiver was signed by the defendant in open court in the presence of the defendant's lawyer(s) and the undersigned judge. The defendant asserted that he had previously read the waiver. I find that the defendant's decision to waive extradition to be knowingly, intelligently, and voluntarily made.

DATED this _____ day of _____, 19 _____.

JUDGE

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

TO:

Patient's Full Name:

Date of Birth:

If Patient is a child, name of parent:

Street Address:

City, State and ZIP code:

Home Phone:

Work Phone:

For the purpose of potential legal proceedings in which the Kitsap County Prosecuting Attorney's Office is a party, I hereby authorize that all medical information from the following date(s) of service, _____, be released and furnished to:

Kitsap County Prosecuting Attorney
Attn:
614 Division Street, MS 35
Port Orchard, WA 98366

The term "medical information" as it relates to this authorization includes any and all medical information, opinions, insurance forms, physicals, operative reports, laboratory reports, x-rays (or copies) and x-ray reports, emergency room reports, and pathology reports.

I also specifically consent to disclose in conjunction with this release authorization, any and all drug and alcohol information that is protected by federal and state law. I also specifically consent to disclose in conjunction with this release authorization, any and all mental health information that is protected by federal and state law. I also specifically consent to disclose in conjunction with this release authorization, any and all information regarding sexually transmitted diseases or HIV/AIDS information that is protected by federal and state law.

I specifically consent to transmission of my medical records via facsimile (fax) machine if requested and that a photocopy of this release shall have the same effect as the original.

Signature

Date

**MEDICAL RECORDS DISCLOSURE REQUEST TO HOSPITAL
UNDER RCW 70.02.060**

June 22, 1999

Hospital
Medical Records Section
Wellness Boulevard
Hometown, WA 98000

RE: Medical Records for: ; DOB
Date of Visit:
City/State v. , Case No.
Trial Date/Time: / am/pm
Trial Location:

Dear Sir or Madam:

This letter is to advise you that under RCW 70.02.060, the Prosecutor's Office is requesting the medical records for the above-named patient/victim who was seen at your facility on the date noted. A subpoena duces tecum which requires production of the records will be served shortly after receipt of this letter.

Under the state law, the patient and/or the facility must petition for a protective order in court within 14 days of receipt of this letter to prevent release of the medical records. Enclosed is a copy of our letter to the patient.

Please call me if you have any questions. Thank you for your assistance with this matter.

Very truly yours,

Deputy Prosecuting Attorney

enclosure: Copy of Letter to Patient/Victim

**MEDICAL RECORDS DISCLOSURE REQUEST TO VICTIM
UNDER RCW 70.02.060**

June 28, 1999

RE: Medical Facility:
Date of Visit:
City/State v. _____, Case No.
Trial Date/Time: _____ / _____ am/pm
Trial Location:

Dear Sir or Madam:

This letter is to advise you that under RCW 70.02.060, the Prosecutor's Office is requesting your medical records from the above-named medical facility in order to prosecute its case.

Under the state law, the patient and/or the facility must petition for a protective order in court within 14 days of receipt of this letter to prevent release of the medical records. If you or the medical facility do not obtain a court order within 14 days of receipt of this letter, the health care provider will release your records.

Please call me if you have any questions. Thank you for your assistance with this matter.

Very truly yours,

Deputy Prosecuting Attorney

CHARGING INFORMATION FOR VIOLATIONS OF FOREIGN PROTECTION ORDERS

First or Second Violation of Protection Order

On or about the _____ day of _____, _____, in the County of _____, State of Washington, the above-named Defendant, with knowledge that the (*name of court, i.e. Oregon Superior*) Court had previously issued a foreign protection order pursuant to (*state or tribal, i.e. Oregon State*) law in Cause No. _____, did violate said order by violating the restraint provisions therein, and/or by violating a provision excluding him or her from a residence, a workplace, a school or a daycare, and/or by violating a provision of the order for which a violation is specifically indicated to be a crime; contrary to Laws of 1999, ch. 184, §9.

(Maximum Penalty For First or Second Offense—One (1) year in jail or \$5,000 fine, or both, pursuant to Laws of 1999, ch. 184, §9(1) and RCW 9.92.020, plus restitution, assessments and court costs.)

Third or Subsequent Violation of a Protection Order

On or about the _____ day of _____, _____, in the County of _____, State of Washington, the above-named Defendant, with knowledge that the (*name of court, i.e. Oregon Superior*) Court had previously issued a foreign protection order pursuant to (*state or tribal, i.e. Oregon State*) law in Cause No. _____, did violate said order by violating the restraint provisions therein, and/or by violating a provision excluding him or her from a residence, a workplace, a school or a daycare, and/or by violating a provision of the order for which a violation is specifically indicated to be a crime; and furthermore, the defendant has at least two prior convictions for violating the provisions of a no-contact order issued under Chapter 26.09, 26.10, 26.26, or 26.50 RCW, or any federal or out-of-state order that is comparable to a no-contact order or protection order that is issued under Washington law; contrary to contrary to Laws of 1999, ch. 184, §9.

(Maximum Penalty -- five (5) years imprisonment and/or a \$10,000 fine pursuant to Laws of 1999, ch. 184, § 9(4) and 9A.20.021(1)(c), plus restitution and assessments.)

Assault in Violation of Foreign Protection Order

On or about the _____ day of _____, _____, in the County of _____, State of Washington, the above-named Defendant, with knowledge that the (*name of court, i.e. Oregon Superior*) Court had previously issued a foreign protection order pursuant to (*state or tribal, i.e. Oregon State*) law in Cause No. _____, did violate said order by violating the restraint provisions therein, and/or by violating a provision excluding him or her from a residence, a workplace, a school or a daycare, and/or by violating a provision of the order for which a violation is specifically indicated to be a crime; and furthermore did intentionally assault another and/or engaged in conduct that was reckless and created a substantial risk of death or serious physical injury to another, to wit: (*name of victim*); contrary to the contrary to contrary to Laws of 1999, ch. 184, §9.

(Maximum Penalty -- five (5) years imprisonment and/or a \$10,000 fine pursuant to Laws of 1999, ch. 184, § 9(3) and 9A.20.021(1)(c), plus restitution and assessments.)

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IN THE COURT OF THE STATE OF WASHINGTON FOR COUNTY

STATE OF WASHINGTON,
Plaintiff,
-vs-
Defendant.

NO.
MOTION AND DECLARATION FOR
A WARRANT TO APPREHEND AND
DETAIN A MATERIAL WITNESS

COMES NOW the STATE OF WASHINGTON, by and through _____ Deputy
Prosecuting Attorney, and moves the Court for a material witness warrant of arrest pursuant to CrR 4.10
for Jane Doe to attend a hearing to determine whether the witness's testimony is material. This motion is
based on the record and file in this cause, and upon the declaration below.

WSBA
Deputy Prosecuting Attorney

I certify (or declare) under penalty of perjury under the laws of the State of Washington pursuant
to RCW 9A.72.085 that the following is true and correct.

I, _____, am a duly appointed, qualified and acting Deputy Prosecuting Attorney for ___
_____ County, and declare I have personal knowledge of the matters set forth above and that I am
competent to testify of the matters stated herein.

The State believes the witness's testimony to be material and that it may become impracticable to
secure the presence of the witness by subpoena for the following reasons:

DATED: _____, at _____, Washington.

WSBA
Deputy Prosecuting Attorney

1 IN THE _____ COURT OF THE STATE OF WASHINGTON FOR _____ COUNTY

2
3 STATE OF WASHINGTON,

4 Plaintiff,

NO.

5 -vs-

6
7 Defendant.

ORDER FOR ISSUANCE OF A
WARRANT OF ARREST TO
APPREHEND AND DETAIN
MATERIAL WITNESS

8
9 THIS MATTER having come before the Court pursuant to the State's motion; the Court having
10 considered the motion and declaration for an order for issuance of a warrant of arrest to apprehend and
11 detain material witness, _____, the records and files in this cause, and the statements of counsel, it
12 is hereby

13 ORDERED that a warrant shall issue for the material witness, _____, arrest, as
14 probable cause exists for such arrest.

15 IT IS FURTHER ORDERED that upon apprehension, the material witness shall be held in the
16 ____ (jail) _____, and be brought before this Court as soon as possible for determination of
17 testimony materiality, and deposition thereof, and bail.

18 DONE IN OPEN COURT this ____ day of _____, 2008.

19
20 _____
J U D G E

21 PRESENTED BY:

APPROVED FOR ENTRY:

22
23 _____
24 WSBA
25 Deputy Prosecuting Attorney

23 _____
24 WSBA
25 Attorney for Defendant

1 IN THE COURT OF THE STATE OF WASHINGTON FOR COUNTY

2
3 STATE OF WASHINGTON,

4 Plaintiff,

NO.

5 -vs-

6 WARRANT OF ARREST FOR THE
7 APPREHENSION AND DETENTION
OF MATERIAL WITNESS

8 Defendant.

9 TO: The Sheriff of _____ County—Greeting:

10 An Order for the Arrest and Detention of Material Witness _____ having been filed
11 on the ___ day of _____, _____, in the _____ Court of the State of Washington for the
12 County of _____;

13 YOU ARE THEREFORE commanded forthwith to arrest the above-named material witness Jane
14 Doe and bring her before this Court to provide testimony in the above-entitled cause. Or, if the said
15 Court has adjourned for the session, that you deliver her to the custody of the Jailer of the County of _____
16 _____.

17 By order of the Court.

18 WITNESS the Honorable _____, Judge of the said _____ Court, and the seal
19 of said Court affixed this _____ day of _____, 2008.

20 _____
County Clerk and Clerk of the Court

21 By _____
22 Deputy

23 Bail fixed at \$

24 The State having presented probable cause to arrest material witness Jane Doe;

25 IT IS THE ORDER of this Court that if said material witness cannot be located within the
26 jurisdiction of _____ County, State of Washington, service of this warrant upon material witness by
27 telegram or teletype to police officers outside the jurisdiction of said County, pursuant to RCW
28 10.31.060, is hereby authorized.

DATED this _____ day of _____, 2008.

JUDGE

1 **IN THE**
2 **FOR**

DISTRICT/MUNICIPAL COURT
COUNTY, STATE OF WASHINGTON

3 STATE OF WASHINGTON,

4 Plaintiff,

5 -vs-

6 Defendant.

NO.

PLAINTIFF'S MEMORANDUM IN
SUPPORT OF THE ADMISSION OF A
911 TAPE

7
8 **I. STATEMENT OF FACTS**

9 On (date), at approximately (time), called 911. S/he reported that: [insert facts]

10
11 **II. ARGUMENT**

12 **A. THE 911 TAPE RECORDING IS ADMISSIBLE AS A BUSINESS RECORD**
13 **PURSUANT TO RCW 5.45.020**

14 RCW 5.45.020 provides that:

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

20 In *State v. Bradley*, 17 Wn. App. 916, 918, 567 P.2d 916 (1977), *review denied*, 89 Wash.2d
21 1013 (1978), the court recognized that a computer printout of a 911 call was properly admitted under
22 this statute: The court stated that:

23 First, it contains the statements of the person who received the call, dispatched
24 the officers and recorded the time of their arrival; and second, the printout contains the
25 declarations of the person who placed the phone call and described the nature and
26 location of the incident. We find no error. The printout is a record of an event made
27 in the regular course of business that satisfies the requirements for admission under the
28 Uniform Business Records Act, RCW 5.45.020.

See also, State v. Kreck, 86 Wn.2d 112, 542 P.2d 782 (1975); *State v. Ross*, 42 Wn. App. 806, 810,
714 P.2d 703 (1986). Admission of a business record does not violate the defendant's confrontation
rights and admission does not turn upon whether the individual who prepared the business record is
unavailable to testify. *See State v. Monson*, 113 Wn.2d 833, 841, 784 P.2d 485 (1989).

Since 911 tapes are made at the time of every call in the regular course of business and such
call are relied upon to dispatch fire and police personnel, the tape is admissible under RCW 5.45.020
as a business record. Moreover, it should be noted that RCW 9.73.090(1) and (3) exempts incoming

1 telephone calls to police and fire stations from the prohibition against recording conversations
2 without the consent of both parties. See *State v. Fjermestad*, 114 Wn.2d 828, 832, 791 P.2d 897
3 (1990); *State v. Bonilla*, 23 Wn. App. 869, 874, 598 P.2d 783 (1979).

4 In *State v. Robinson*, 38 Wn. App. 871, 885, 691 P.2d 213 (1984), *review denied*, 103 Wn.2d
5 1015 (1985), the court listed the foundation requirements for the admission of a tape recording into
6 evidence:

7 (1) It must be shown that the mechanical transcription device was capable of taking
8 testimony. (2) It must be shown that the operator of the device was competent to
9 operate it. (3) The authenticity and correctness of the recording must be established.
10 (4) It must be shown that changes, additions, or deletions have not been made. (5) The
11 manner of preservation of the record must be shown. (6) Speakers must be identified.
12 (7) It must be shown that the testimony elicited was freely and voluntarily made,
13 without any kind of duress.

14 In *State v. Robinson*, *supra*, an answering machine owner was allowed to testify as to the
15 mode of operation and reliability of the machine, as well as the chain of custody of the tape.

16 Admission of a transcript of a tape recording to assist the jury in listening to the tape was
17 approved by the court in *State v. Cunningham*, 93 Wn.2d 823, 825, 613 P.2d 1139 (1980):

18 It is well recognized that accurate typewritten transcripts of sound recordings, used
19 contemporaneously with the introduction of the recordings into evidence, are
20 admissible to assist the jury in following the recordings while they are being played.
21 The admission of such transcripts as an aid in listening to tape recordings...is a matter
22 committed to the sound discretion of the trial court. (Citations omitted).

23 In *State v. Castellanos*, 132 Wn.2d 94, 935 P.2d 1353 (1997), the court held that a jury may be
24 permitted unlimited access to an audio tape of a wiretap and player during deliberations if the trial
25 court determines that the exhibit bears directly upon the charge and is not unduly prejudicial. The
26 court does, of course, retain the authority to limit access to a player during deliberations if the
27 emotional content of the tape recording is unfairly inflammatory. *Id.*

28 Since the 911 tape recording satisfies the requirements of the business record exception to the
hearsay rule pursuant to RCW 5.45.020, plaintiff urges this court to admit the tape recording into
evidence and allow the jury unrestricted access to such tape during deliberations as permitted in *State*
v. Castellanos, *supra*.

B. THE CALLER'S STATEMENTS ON THE 911 TAPE ARE ADMISSIBLE AS A PRESENT SENSE IMPRESSION UNDER ER 803(a)(1)

ER 803(a)(1) provides that the following statements are not excluded by the hearsay rule,
regardless of the declarant's availability:

1 Present Sense Impression. A statement describing or explaining an event or
2 condition made while the declarant was perceiving the event or condition, or
immediately thereafter.

3 “The rule does not require that the statement be in response to a startling or exciting event. The rule
4 is based on the assumption that under circumstances defined by the rule, there is very little chance of
5 misrepresentation or conscious fabrication. presumes that the element of spontaneity reduces the
6 chance of misrepresentation to an acceptable level.” 5B K. Tegland, Wash. Prac., *Evidence Law and*
7 *Practice* § 360, at 152 (3d ed. 1989). However, the statement must be made “while” the declarant
8 was perceiving the event or condition or “immediately thereafter.” See *State v. Hieb*, 39 Wn. App.
9 273, 693 P.2d 145 (1984), *rev’d on other grounds* 107 Wn.2d 97, 727 P.2d 239 (1986). Telephone
10 calls to 911 made within 10 minutes after automobile accident have been held to satisfy the present
11 sense exception to the hearsay rule. See *Miller v. Crown Amusements, Inc.*, 821 F. Supp. 703 (S.D.
12 Ga. 1993). The statement must also be limited to describing or explaining the event or condition.

13 In this case, the caller’s statements on the 911 tape should be admitted as present sense
14 impressions under ER 803(a)(1) because they described [insert the event] and were made [insert the
15 facts---while perceiving the event or immediately thereafter.]

16 **C. THE CALLER’S STATEMENTS ON THE 911 TAPE ARE ADMISSIBLE AS**
17 **EXCITED UTTERANCES UNDER ER 803(A)(2)**

18 ER 803(a)(2) contains the following hearsay exception:

19 Excited Utterance. A statement relating to a startling event or condition made
20 while the declarant was under the stress of excitement caused by the event or
condition.

21 Excited utterances are deemed reliable because they are made under shock, stress, or
22 excitement rather than reflection or self-interest. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194
23 (1992). Moreover, the admission of such utterances does not violate the defendant’s constitutional
24 right to confront witnesses, even though the declarant does not testify at trial. *State v. Palamo*, 113
25 Wn.2d 789, 783 P.2d 575 (1989); *State v. Strauss*, 119 Wn.2d 401 (1992). In addition, the proponent
26 of the utterance is not required to establish the declarant’s unavailability. *State v. Palamo*, 113
Wn.2d at 797.

27 In *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992), the court found that three
28 factors must be met for a statement to qualify as an excited utterance:

First, a startling event or condition must have occurred. Second, the statement must

1 have been made while the declarant was under the stress of excitement caused by the
2 event or condition. Third, the statement must relate to the startling event or condition.

3 The first factor focuses upon the reaction of the declarant in determining if an event is startling. It is
4 irrelevant that others may not find the same event startling. *Chapin*, 118 Wn.2d at 687. In *State v.*
5 *Chapin, supra*, the court examined an Alzheimer patient’s agitated demeanor and statement about
6 being raped whenever he saw a nurse’s aide. The court found that both the alleged rape and seeing
7 the aide constituted a startling event.

8 The second factor necessary to constitute an excited utterance is that the statement occur while
9 the declarant is under the stress of excitement caused by the startling event. “The key to the second
10 element is spontaneity. Ideally, the utterance should be made contemporaneously with or soon after
11 the startling event giving rise to it.” *Chapin*, 118 Wn.2d at 688. However, a lapse of time between
12 the event and the statement will not preclude the existence of an excited utterance. *State v. Flett*, 40
13 Wn. App. 277, 288, 699 P.2d 774 (1997) (A statement of an attempted rape victim 7 hours after the
14 event was properly admitted due to the “continuing stress.”); *State v. Strauss*, 119 Wn.2d 401, 416,
15 832 P.2d 78 (1992) (A victim’s statement 3.5 hours after a sexual assault was made while under the
16 influence of the event as evidenced by the fact that the victim was distraught, very red in the face,
17 crying and appeared to be in shock.); *State v. Sims*, 77 Wn. App. 236, 238, 890 P.2d 521 (1995) (A
18 victim’s hesitancy in making a statement does not negate its spontaneity.) In addition, responses to
19 questions may be admissible under ER 803(a)(2). *See, e.g., State v. Griffith*, 45 Wn. App. 728, 737-
20 38, 727 P.2d 247 (1986); *State v. Robinson*, 44 Wn. App. 611, 615-16, 722 P.2d 1379, *review denied*,
21 107 Wn.2d 1009 (1986); *State v. Hubbard*, 37 Wn. App. 137, 146, 679 P.2d 391 (1984), *reversed on*
22 *other grounds*, 103 Wn.2d 570, 693 P.2d 718 (1985).

23 The third factor requires that the utterance “relate to” the startling event. In *Chapin*, 118
24 Wn.2d at 688, the court stated that “[a]ny utterance that may reasonably be viewed as having been
25 about, connected with, or elicited by the startling event meets this requirement.”

26 Courts have also recognized that excited utterances may arise when the declarant calls 911. In
27 *State v. Guizzotti*, 60 Wn. App. 289, 803 P.2d 808, *review denied*, 116 Wn.2d 1026 (1991), the court
28 found that a rape victim’s statements on a 911 tape was admissible as an excited utterance.

In this case, _____’s statements on the 911 tape constitute excited utterances. First, the
statement concerns _____, which the declarant perceived as a startling event. Second, the

1 declarant's (crying/agitated demeanor/etc.) indicates that s/he was under the "stress of
2 excitement" of the startling event. In addition, since the phone call was placed shortly after the event,
3 little opportunity for fabrication existed. Lastly, based upon the content of the statement, it is clear
4 that it "related to" the startling event. Since the three factors necessary to continue an excited
5 utterance under ER 803(a)(2) are present, plaintiff urges the court to find the statements admissible.

6 III. CONCLUSION

7 Since the 911 call in this case is admissible as a business record pursuant to RCW 5.45.020
8 and the caller's statements meet the requirements of a present sense impression under ER 803(a)(1),
9 as well as an excited utterance under ER 803(a)(2), plaintiff respectfully requests this court to admit
10 the tape and the statements therein into evidence.

11
12 Dated this day of , .

13
14 Respectfully submitted,

15
16 Deputy Prosecuting Attorney

17 WSBA #
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1 **ADMISSION OF A 911 TAPE - DIRECT EXAMINATION**
2 **OF A TECHNICIAN WHO COPIED THE TAPE**

- 3 1. Please state your name and occupation.
- 4 2. How long have you been so employed?
- 5 3. What is your position and duties?
- 6 4. Have you received training on the 911 system?
- 7 5. Are you authorized to make 911 tapes from ?
- 8 6. [Show the tape to the defense.] I'm handing you what has been marked as State/City's
9 exhibit number . Do you recognize this?
- 10 7. What is it? A 911 tape. Did you record this tape? Yes
- 11 8. How can you tell you recorded the tape? My voice is at the end of the transmission.
- 12 9. How did you make this tape?
- 13 10. Was it recorded from the Master Tape kept at ? How is the Master Tape
14 and the copy preserved?
- 15 11. Does this recording, marked as State/City's exhibit number , contain an authentic
16 and correct recording of the 911 call made on (Date) from
17 (Address)?
- 18 12. Have any changes, deletions or additions been made?

19 Your honor, at this time the State/City moves for the admission of the tape into evidence.

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2 **IN THE SUPERIOR COURT OF WASHINGTON FOR** **COUNTY**

3
4 STATE OF WASHINGTON,
5 Plaintiff,
6 vs. _____,
7 Defendant.

NO.
STATE'S MOTION TO VOID NUNC
PRO TUNC TERMINATION OF
ORDER OF PROTECTION

8
9 **A. FACTS RELEVANT TO MOTION**

10 The defendant is charged with Felony Violation of a No contact Order in Count I, and
11 Unlawful Imprisonment in Count II, based on an incident which occurred on March 16, 1996 (see
12 attached Information and Certification for Determination of Probable Cause). As reflected in the
13 Certification, the victim, Dawn, the defendant's wife, requested and was granted a temporary
14 Order of Protection in District Court on March 7, 1996. (See attached certified copy of Petition,
15 Notice and Order). The defendant was served with the order on March 8, 1996. The case was
16 transferred to Family Court for the hearing for permanent entry of the order because the defendant
17 and Dawn have a child in common. That hearing was set for March 21, 1996.

18 On March 16, 1886, the defendant violated the order, which led to his arrest and these
19 charges. The defendant bailed out before arraignment. At arraignment on these charges March 21,
20 1996, the defendant was granted a temporary release to transfer bond from District to Superior
21 Court, and was ordered to have no contact with Dawn.

22 Immediately after the arraignment, the defendant, his attorney and Dawn went to family
23 court. While it is not clear exactly what was represented to the court orally, or whether the court
24 was informed that the defendant had just been arraigned on two felony charges, one arising from
25 the violation of the temporary order of protection, the court signed an order, composed by the
26 defendant's lawyer in the criminal matter and signed by Dawn and the defendant, terminating the
27 temporary order of protection issued by the district court nunc pro tunc to March 7, 1996, the day
28 it was issued (see copy attached).

These events were brought to the attention of the state approximately one month later when
the defendant's lawyer presented a copy of the order nunc pro tunc to the prosecutor, and asked
that count I be dismissed, arguing that there was no valid order in effect at the time of the offense.

B. ARGUMENT

The defendant takes the position that the nunc pro tunc order terminating the protection
order to the date it was issued prevents the state from going forward on the felony violation of the
no contact order. This claim is without merit because, under Washington law, orders nunc pro

1 tunc are only valid to make the record reflect what actually happened, that is, to correct
2 “ministerial or clerical errors,” and cannot be used to modify a previous order or failure to act.
3 Therefore, the Superior Court order terminating the order of protection is invalid, the order of
4 protection was still in effect on the date of this offense, and the state’s charge must stand.

5 The purpose of orders nunc pro tunc was recently addressed in *State v. Luvene*, 127 Wn.2d
6 690, 903 P. 2d 960 (1995). In *Luvene*, the court entered an order extending the time for filing
7 the death penalty notice nunc pro tunc for good cause to a date when no hearing was actually held.
8 The Supreme Court held the extension invalid, and stated:

9 A nunc pro tunc order is appropriate only to record some act of the court
10 done at an earlier time but which was not made part of the record. *State v.*
11 *Smisvaart*, 103 Wn.2d 636, 640, 694 P.2d 654 (1985). It cannot be used to remedy
12 the failure to take an action at that earlier time. *State v. Mehlhorn*, 195 Wash. 690,
13 692-93, 82 P.2d 158 (1938). There was no judicial action taken on August 12. The
14 order signed "nunc pro tunc August 12, 1992", therefore, cannot be a valid
15 extension of the statutory period.

16 *State v. Luvene*, 127 Wn. 2d at 715-16.

17 Similarly, in *State v. Smisseart*, 103 Wn.2d 636, 694 P.2d 654 (1985), the defendant was
18 erroneously sentenced to a maximum term of 20 years, when the statutory maximum was life in
19 prison.

20 The court entered an amended judgement sentencing the defendant to life in prison, nunc pro tunc,
21 to the original sentencing date. On review, the Supreme Court stated:

22 [a] retroactive entry is proper only to rectify the record as to acts which did occur,
23 not as to acts which should have occurred. Thus resentencing should date from
24 entry of the amended judgement.

25 *State v. Smisseart*, 103 Wn.2d at 641.

26 Application of the relevant law to the facts of this case indicates the Family court’s use of
27 an order nunc pro tunc to terminate the protection order to the date of its issuance was improper
28 and had no effect. The court granted the order of protection on March 7, 1996. There is no
indication in the record, or any other evidence, that the ruling was otherwise not recorded properly.
thus, the subsequent order nunc pro tunc was not used to rectify a clerical error and correct the
record as to what the court actually intended and order on March 7, 1996, but was instead
improperly used to terminate an order that was properly in effect on and after March 7. At best, as
in *Smisseart*, the court’s termination of the protection order is valid only from the date of entry.
This court should therefore find that the order for protection was properly in place on the date of
this offense and the state should be allowed to proceed with the count I as charged. For the court
to rule otherwise is contrary to the settled law on orders nunc pro tunc, and would allow
defendants to manipulate the system to avoid proper charges when an element of the offense is a
previously entered valid order of a court.

29 C. Conclusion

30 The state respectfully request this court find the protection order valid as to the date of this
offense, which will allow the state to proceed on Count I as charged.

1 Respectfully submitted this 18th day of July, 1996

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4 R. Fox WSBA #12345
5 Deputy Prosecuting Attorney
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**IN THE
FOR**

**DISTRICT/MUNICIPAL COURT
COUNTY, STATE OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

-vs-

Defendant.

NO.

PLAINTIFF'S MEMORANDUM IN
SUPPORT OF THE ADMISSION OF A
BATTERED WOMAN SYNDROME
EXPERT WITNESS

I. STATEMENT OF FACTS

The City/State will offer the testimony of a Domestic Violence Legal Advocate to explain the Battered Woman Syndrome. The testimony will include the cycle of violence, the characteristics of a battered woman, and an explanation as to why a battered woman will not leave an abusive relationship or inform police or friends of the abuse. The testimony is designed to promote the jury's understanding of the victim's perceptions and behavior.

II. ARGUMENT

**A. THE BATTERED WOMAN SYNDROME IS GENERALLY
ACCEPTED IN THE SCIENTIFIC COMMUNITY**

The first factor which must exist in order to admit an expert's testimony on the battered woman syndrome is that "the opinion is based upon an explanatory theory generally accepted in the scientific community." *State v. Ciskie*, 110 Wn.2d 263, 271, 751 P.2d 1165 (1988). In *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984), the court found that "scientific understanding of the battered woman syndrome is sufficiently developed so that expert testimony on the syndrome is admissible." The court stated that:

the battered woman syndrome is a recognized phenomenon in the psychiatric profession and is defined as a technical term of art in professional diagnostic textbooks. The syndrome is comprised of three distinct phases. In the first phase, tension mounts between the woman and her partner and minor abuse occurs. More serious violence follows and the woman experiences a sense of powerlessness to do anything to stop her husband. Psychologists describe a phenomenon known as "learned helplessness," a condition in which the woman is psychologically locked into her situation due to economic dependence on the man, an abiding attachment to him, and the failure of the legal system to adequately respond to the problem. Finally, there is a temporary lull in the physical abuse inflicted on the battered woman, and she forgives her assailant, hoping that the abuse will not reoccur.

Allery, 101 Wn.2d at 596-97. The prosecution's witness in this case will testify about this cycle of violence which was recognized by the court in *State v. Allery, supra*, as an accepted theory in the scientific community.

**B. THE BATTERED WOMAN SYNDROME EVIDENCE WOULD BE
HELPFUL TO THE JURY**

The second factor which must be established for the admission of expert testimony about

1 the battered woman syndrome is that the expert testimony would be helpful to the trier of fact.
2 This question has also been answered by our Supreme Court in both spousal situations and non-
3 marital/intimate relationships. In *State v. Allery*, 101 Wn.2d at 597, the court stated that:

4 We find that expert testimony explaining why a person suffering from the
5 battered woman syndrome would not leave her mate, would not inform police or
6 friends, and would fear increased aggression against herself would be helpful to a
7 jury in understanding a phenomenon not within the competence of an ordinary lay
8 person.

9 Similarly, in *State v. Ciskie*, 110 Wn.2d at 274, the court found that the expert's testimony
10 about the syndrome as it pertains to persons in intimate relationships would be useful to the trier of
11 fact. The court stated that:

12 The average juror's intuitive response could well be to assume that someone in
13 such circumstances could simply leave her mate, and that failure to do so signals
14 exaggeration of the violent nature of the incidents and consensual participation.

15 It is the prosecution's position in this case that the jurors will not understand why the
16 victim did not (leave the relationship/report the incident/tell friends) and that the syndrome
17 testimony is necessary to promote an understanding of the victim's perceptions and behaviors as
18 recognized in *State v. Allery, supra*, and *State v. Ciskie, supra*.

19 **C. THE PROSECUTION'S WITNESS IS A QUALIFIED EXPERT**
20 **REGARDING THE BATTERED WOMAN SYNDROME**

21 Finally, the proposed witness qualifies as an expert based upon her training and experience.
22 In *State v. Simon*, 64 Wn. App. 948, 963, 831 P.2d 139 (1991), *aff'd in part, rev'd in part*, 120
23 Wn.2d 196, 840 P.2d 172 (1992), the court found that a detective who investigated street
24 prostitution for over 6 years, investigated over 400 prostitution related crimes and over 50
25 promoting prostitution cases, as well as talked with prostitutes about their relationships with
26 pimps, qualified as an expert on the pimp/prostitute relationship and could testify as to the
27 relationship's nature. Although the expert had "no formal course work in the area, a witness need
28 not possess the academic credentials of an expert; practical experience in a given area can qualify a
witness as an expert. *State v. Smith*, 88 Wn.2d 639, 647, 564 P.2d 1154 (1977), *rev'd on other*
grounds, State v. Jones, 99 Wash.2d 735, 664 P.2d 1216 (1983). *See also, State v. Ortiz*, 119
Wn.2d 294, 310 (1992) (Officer qualifies as an expert on tracking defendants based upon
experience). Similarly, in *People v. Day*, 2 Cal. App. 4th 405, 413 (1992), the court approved of an
advocate working at a battered women's shelter as an expert witness based upon her experience.

In this case, _____ has been a domestic violence advocate for _____ years and has
assisted over _____ abused women. Her duties as an advocate include: _____. Her training in this
area consists of attendance at the following training sessions/seminars: _____. Ms.
's formal education consists of a _____ degree in _____. A copy of her resume is
attached. [insert facts which establish expertise]

The City/State's witness is clearly an expert witness under ER 702 on the battered woman
syndrome on the basis of her practical experience and training.

1 **D. THE WITNESS WILL NOT GIVE OPINION TESTIMONY AS TO**
2 **WHETHER THE ALLEGED CRIME OCCURRED**

3 In *State v. Ciskie, supra*, the court noted that the testimony of an expert can be limited by
4 ER 403 to exclude evidence if there is a danger of unfair prejudice. The expert was not allowed to
5 give her testimony about the victim's credibility as to whether a rape occurred. The court stated
6 that this was analogous to testimony of a diagnosis of the "rape trauma syndrome," found
7 inadmissible for the purpose of allowing an expert's opinion that a victim had been raped in *State*
8 *v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such testimony was excluded because it
9 lacked scientific reliability and unfairly prejudices the defendant. In addition, "such testimony
10 amounts to a comment on the credibility of a witness." 110 Wn.2d at 280. Testimony about a
11 defendant's guilt or whether the victim meets a profile or syndrome is also not appropriate. *State*
v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018 (1994); *State*
v. Stevens, 58 Wn. App. 478, 497, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128
(1990).

12 In this case, the prosecution will not be asking the expert witness whether the alleged crime
13 occurred or whether the victim is a credible battered woman. The expert will also not be
14 commenting upon the defendant's guilt or innocence.

14 **III. CONCLUSION**

15 Based upon the established case law discussed herein, the City/State believes that
16 admission of the prosecution's expert witness testimony concerning the battered woman syndrome
17 is necessary so that the jury can accurately weigh the victim's credibility after putting here
18 perceptions and behaviors in the context of the Battered Woman Syndrome.

19 Dated this day of , 1997.

20 Respectfully submitted,

21
22 Deputy Prosecuting Attorney
23 WSBA #
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**JURY INSTRUCTIONS AND SPECIAL VERDICT
FORM RE: FAMILY OR HOUSEHOLD MEMBERS**

INSTRUCTION NO. _____

Family or household members means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 10.99.020(1)

INSTRUCTION NO.

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, if any, these instructions and a verdict form.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

You will also be furnished with a special verdict form. If you find the defendant not guilty, do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form. In order to answer a question on the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no". If you do not unanimously agree then answer "no unanimous agreement". When you have arrived at the answer, fill in the special verdict form to express your decision.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

WPIC 151.00 (2nd ed.)

WPIC 160.00 (2nd ed.)

1 IN THE _____ OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF _____
3

4 STATE OF WASHINGTON,

5
6 Plaintiff,

NO.

7
8 -vs-

SPECIAL VERDICT FORM

9
10
11
12
13 Defendant.
14

15 We, the jury return a special verdict by answering as follows —

16 Did the defendant commit the crime of _____ against a family or
17 household member?

- 18 Yes
19 No
20 No Unanimous Agreement

21 _____
22 Presiding Juror
23
24
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27 RCW 10.99.020(1)
28

1
2
3 IN THE DISTRICT COURT FOR THE COUNTY OF _____, WASHINGTON

4 STATE OF WASHINGTON,

5 Plaintiff,

NO.

6 -vs-

7 PRE-TRIAL DIVERSION
8 AGREEMENT

9 Defendant.

10 Comes Now the Plaintiff, State of Washington, by and through _____, Deputy
11 Prosecuting Attorney, and the Defendant, by and through his/her attorney _____,
12 and hereby enter the following pretrial diversion agreement (hereafter Agreement) -

13 **Defendant's Agreement**

14 **1. Waiver of Speedy Trial (CrRLJ 3.3(j)).** The Defendant understands that he/she has the right to
15 be tried within 90 days following his/her arraignment date. He/she further understands that if he/she does
16 not receive a trial within this time period that this case may be dismissed with prejudice unless he/she waives
17 this right. The Defendant hereby waives his/her right to speedy trial to _____.

18 **2. Waiver of Jury Trial (CrRLJ 6.1.1(a)).** The Defendant understands that he/she has the right to
19 trial by jury unless he/she waives the right to a jury trial. The Defendant hereby waives his/her jury trial
20 right and requests that his/her guilt or innocence be decided by a judge.

21 **3. Stipulation to Admissibility of Reports (CrRLJ 6.1.2(b)).** The Defendant wishes to submit the
22 case on the record. He/she understands that this means that if a judge finds that the Defendant is in breach
23 of this Agreement, the judge will read the police reports and other materials submitted by the prosecuting
24 authority and, based solely upon that evidence, the judge will decide if the Defendant is guilty or not guilty
25 of the crime(s) charged herein. The Defendant understands that it is very likely the judge will find the
26 Defendant guilty since the only evidence the judge will consider are the reports and other materials
27 submitted by the prosecuting authority.

28 The Defendant understands that, by this process, he/she is giving up the constitutional right to a jury
trial, the right to hear and question witnesses, the right to call witnesses in his/her own behalf, and the right
to testify or not to testify.

1 The Defendant understands that the maximum sentence for the crime(s) charged of
2 _____ is/are _____ days in jail and/or a \$ _____
3 fine, _____ is/are _____ days in jail and/or a
4 \$ _____ fine, plus costs and assessments, and that the judge can impose any sentence up to the
5 maximum, no matter what the prosecution or the defense recommends.

6 No one has made any threats or promises to get the Defendant to submit this case on the record other
7 than the Plaintiff's promises made in this Agreement.

8 **4. Waiver of Defendant's Right to be Present in Court.** The Defendant understands and agrees that
9 he/she shall be present in court at all future court hearings herein. The Defendant understand that he/she has
10 the right to be present in court on any motion to revoke this Agreement, and/or at a subsequent trial to
11 determine the Defendant's guilt if this Agreement is found by the Court to have been violated by the
12 Defendant. If the notice requirements as discussed in the following paragraphs are satisfied, the Defendant
13 hereby waives his/her right to be present in court (1) on any motion to revoke this Agreement and/or (2) at
14 a subsequent trial to determine the Defendant's guilt.

15 The Defendant further understands and agrees that the Court may proceed without the Defendant
16 being present in court if the Plaintiff files a motion to revoke this Agreement and the Defendant fails to
17 appear at the hearing on the motion so long as a notice of the hearing date is sent to the Defendant's attorney
18 or the Defendant's last known address if the Defendant is not represented by an attorney.

19 The Defendant further understands and agrees that the Court may proceed to determine the
20 Defendant's guilt or innocence on the criminal charge(s) herein, and enter judgment and sentence against
21 the Defendant if he/she is found guilty, all without the Defendant being present in court [trial in absentia]
22 if the Court revokes this Agreement after the Plaintiff files a motion to revoke, and the Defendant fails to
23 appear at any hearing on the motion as discussed in the previous paragraphs.

24 **Prosecution's Agreement**

25 **1. Amendment of Charge(s).** The Plaintiff agrees to move to amend the charge(s) herein [and the
26 Defendant agrees to plead guilty] to _____ at a hearing
27 to be scheduled in approximately [one year] [two years] [five years] from the signing of this
28 Agreement upon the Defendant satisfying the following conditions-

The Defendant shall have no criminal law violations; and

1 The Defendant shall pay court costs of [\$500] [\$_____]; and

2 The Defendant shall pay any bench warrant costs imposed herein; and

3 Restitution. The Defendant agrees to pay the following restitution to the Court Clerk, who shall
4 disseminate the moneys collected as follows-

5

\$ Amount	Name	Address, City, Zip Where Restitution is to be sent
6	7	8

9 The Defendant shall pay the total financial obligation agreed to herein at [\$75] [\$_____] per
10 month by the 5th of each month beginning on _____. Payments shall be made to
11 _____ Court, _____, WA _____. Any check should include the
12 Defendant's full name and case number.

13 Probation Supervision. The Defendant agrees that compliance with this Agreement shall be
14 monitored by the probation department of the court. The Defendant agrees to contact probation within one
15 (1) day of the signing of this Agreement, make all appointments with probation, and abide by all probation
16 rules.

17 Community Service. Within _____ days, the Defendant shall successfully perform _____ hours of
18 community service.

19 DUI Victim's Panel. Within ninety (90) days, the Defendant shall attend a DUI victim's panel.

20 Alcohol/Drug Treatment. Within ninety (90) days, the Defendant shall obtain an alcohol/drug
21 evaluation from a state-certified agency, and thereafter successfully comply with all treatment
22 recommendations.

23 Ignition Interlock Device. The Defendant shall agree to entry of an Order Prohibiting Defendant
24 From Operating Any Vehicle That Is Not Equipped with a Functioning Ignition Interlock Alcohol Device
25 in accordance with RCW 46.20.720.

26 Drinking and Driving. The Defendant shall not drive or be in actual physical control of a motor
27 vehicle while having an alcohol concentration of 0.04 or more within two hours after driving or being in
28 physical control. The Defendant shall not refuse to submit to a test of his/her breath or blood to determine
alcohol and/or drug concentration upon request of a law enforcement officer who has reasonable grounds

1 to believe that the Defendant was driving or in actual physical control of a motor vehicle while under the
2 influence of an intoxicating liquor and/or drugs.

3 Liquor Prohibited. The Defendant shall not possess or consume liquor as defined in RCW 66.04.010
4 as now or hereafter amended, or be in a business establishment where liquor is served.

5 DV Perpetrator's Program. Within ninety (90) days, the Defendant shall obtain a domestic violence
6 perpetrator's treatment evaluation from a state-certified agency, and thereafter successfully comply with all
7 treatment recommendations.

8 DV Parenting Class. The Defendant shall attend and successfully complete a parenting class/
9 counseling for a minimum 20 hours that includes discussion concerning the effects of domestic violence on
10 children.

11 No Contact. The Defendant shall not make any attempts (including but not limited to directly or
12 indirectly, in person, in writing, by telephone, or through other persons) to contact the following person(s)
13 - _____.

14 Anger Management Course. The Defendant shall attend and successfully complete an anger
15 management course.

16 Psycho-sexual Evaluation. The Defendant obtain a psycho-sexual evaluation from a state-certified
17 agency, and thereafter successfully comply with all treatment recommendations.

18 Contribution. Within ninety (90) days, the Defendant agrees to make a \$100 contribution to the
19 following agency -

20 Mothers Against Drunk Driving

21 [Local Domestic Violence Shelter]

22 Payments shall be made to MADE or [the local domestic violence shelter], and paid through the _____
23 County Prosecutor's Office. Any check should include the Defendant's full name and case number.

24 _____.

25 _____.

26 _____.

27 **2 Procedure on Defendant's Compliance with Agreement.** Upon the Defendant's compliance with
28 this Agreement and entry of a guilty plea to the amended charge(s) as discussed above, the Plaintiff will
make the following recommendation to the judge -

1 _____ days in jail with _____ suspended for [five years] [two years] [one year]

2 \$ _____ fine with \$ _____ suspended

3 The defendant shall have no violation of any criminal laws

4 Probation shall be [supervised] [unsupervised]

5 **3. Procedure on Defendant's Breach of Agreement.** The Plaintiff reserves the right to prosecute the
6 Defendant upon any breach of the terms or conditions of this Agreement in accordance with the procedures
7 in *State v. Marino*, 100 Wn.2d 719, 674 P.2d 171 (1984) and *State v. Kessler*, 75 Wn. App. 634, 879 P.2d
8 333 (1994).

9 Dated this _____ day of _____, _____.

10 _____
11 Defendant

12 I have read and discussed this document with the defendant
13 and believe that the defendant is competent and fully
14 understands the Agreement.

15 _____

16 WSBA NO.
17 Deputy Prosecuting Attorney

WSBA NO.
Attorney for Defendant

18 **Order of Continuance**

19 This Matter having come on regularly before the undersigned Judge of the above-entitled Court by
20 agreement of the parties for an Order of Continuance; the Court having considered the motion and the files
21 and records herein, and being fully advised in the premises; now, therefore, it is hereby

22 Ordered that the above-entitled matter shall be continued to a date set by separate order. It is further

23 Ordered that the Defendant shall appear at the next scheduled hearing.

24 Done in Open Court this _____ day of _____, _____.

25 _____
JUDGE

26 Presented by:

27 _____

28 WSBA No. _____
Deputy Prosecuting Attorney

Approved for Entry:

Copy Received:

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WSBA No. _____
Attorney for Defendant

Defendant

IN THE DISTRICT COURT FOR THE COUNTY OF _____, WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

-vs-

Defendant.

NO.

MEMORANDUM IN SUPPORT OF
MOTION TO REVOKE PRE-TRIAL
DIVERSION AGREEMENT

ISSUE PRESENTED

Whether a violation of the terms of the pre-trial diversion agreement (“PDA”) entered into between the Kitsap County Prosecuting Attorney’s Office and _____ should be revoked based upon _____’s violation of the terms of the PDA?

FACTS RELEVANT TO THIS MOTION

[Insert facts]

LEGAL ANALYSIS

A revocation of a pretrial diversion is a three step process. First, the Court must determine whether a violation of the agreement has been established by a preponderance of the evidence. Second, the Court must determine whether the prosecutor’s decision to revoke the agreement was reasonable. Finally, the Court must determine whether the prosecutor has established beyond a reasonable doubt that the defendant is guilty of the crimes that were the subject of the PDA.

13. The Defendant Has Violated the Terms of the PDA.

a. General Process - Contract Law

A pretrial diversion agreement, like a plea bargain agreement, is a contract between the prosecution and defendant. *State v. Talley*, 134 Wn.2d 176, 182, 949 P.2d 358 (1998) (plea bargain agreement is a contract, with the defendant giving up constitutional rights in exchange for the prosecution’s agreement to recommend a specific sentence); *State v. Wakefield*, 130 Wn.2d 464, 474, 925 P.2d 183 (1996).

1 In 1984, the Supreme Court was presented with the question of the proper role of the court when the
2 prosecution sought to terminate a pretrial diversion agreement. *State v. Marino*, 100 Wn.2d 719, 674 P.2d
3 171 (1984). After examining the similar rights at stake in probation revocations, plea bargain agreements
4 and pretrial diversion agreements, the Court concluded that a defendant is entitled under the Due Process
5 Clause to have factual disputes concerning an alleged violation of the terms of a pretrial diversion agreement
6 resolved by a neutral fact finder rather than the prosecuting authority. “This includes an independent
7 determination that the deferred prosecution agreement was violated, by a preponderance of the evidence with
8 the burden of proof on the State.” *Marino*, 100 Wn.2d at 725. “...This requirement best safeguards the
9 [defendant’s] right to have the agreement administered equitably, with full protection of the constitutional
10 rights relinquished in the bargain. The State is not unduly burdened as it has no interest in proceeding to
11 prosecution in any case unless a violation has, in fact, occurred.” *Id.*

12 “Preponderance of the evidence” means that sufficient evidence exists to be persuaded that a claim
13 is more probably true than not true. *See, e.g.* WPIC 17.06.01 (2nd ed.).

14 **b. Duty of Good Faith**

15 Every contract has an implied duty of good faith and fair dealing. There is in every contract an
16 implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so
17 that each may obtain the full benefit of performance. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569,
18 807 P.2d 356 (1991). (Citations omitted.)

19 **c. Contract Interpretation - The Parties’ Intent**

20 The “touchstone” of a court’s interpretation of a contract is the parties’ intent. *Tanner Elec..Co-op.*
21 *v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 911 P.2d 1301 (1996). “In Washington, the intent of
22 the parties to a particular agreement may be discovered not only from the actual language of the agreement
23 but also from ‘viewing the contract as a whole, the subject matter and objective of the contract, all the
24 circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the
25 contract, and the reasonableness of respective interpretations advocated by the parties.’” *Tanner*
26 *Elec..Co-op. v. Puget Sound Power & Light Co.*, *supra*. (Citations omitted.)

27 In order for a court to determine the parties’ intent, courts traditionally “look through the form of the
28 transaction and consider its substance.” *Zachman v. Whirlpool Acceptance Corp.*, 120 Wn.2d 304, 314,
841 P.2d 27 (1992). (Citations omitted.)

1 **d. Evidence Rules and Hearsay**

2 ER 1101(c)(1) provides that the Evidence Rules (except with respect to privileges) do not apply in
3 various circumstances, including preliminary determinations in criminal cases and sentencing or granting
4 or revoking probation. As noted in *Marino*, a revocation of a pretrial diversion agreement involves similar
5 rights at stake in probation revocation hearings and plea bargain agreements.

6 Washington case law has long held that a probationer’s right of confrontation is limited and
7 accordingly allows admission of hearsay evidence at a probation revocation hearing. *State v. Nelson*, 103
8 Wn.2d 760, 763-64, 697 P.2d 579 (1985). This holding is in accord with the minimal due process rights
9 granted to a probationer or parolee. *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484
10 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed.2d 656 (1973); *In re Boone*, 103 Wn.2d
11 224, 691 P.2d 964 (1984).

12 “...The current test is a balancing one in which the probationer’s right to confront and cross-examine
13 witnesses is balanced against any good cause for not allowing confrontation. Good cause has thus far been
14 defined in terms of difficulty and expense of procuring witnesses in combination with ‘demonstrably
15 reliable’ or ‘clearly reliable’ evidence.” *Nelson*, 103 Wn.2d at 765.

16 Evidence which is “demonstrably reliable” has been found to constitute good cause for admitting
17 hearsay evidence of a letter from a drug treatment program officer to a probation officer, letters of vocational
18 instructors and caseworkers, official reports from program officials, victims’s statements corroborated by
19 other witnesses, a therapist’s statements corroborated by others, admissions of the probationer, and evidence
20 from court files and state probation reports. *Nelson*, 103 Wn.2d at 764-65.

21 Hearsay documents including urinalysis test results and a lab supervisor’s letter were sufficiently
22 reliable so as to be admissible in a community supervision violation hearing. *State v. Anderson*, 88 Wn.
23 App. 541, 945 P.2d 1147 (Div. 2 1997) (expense factors weigh against requiring the prosecution to present
24 live witnesses since reliability of a lab is clear given its independent and neutral role in testing samples and
25 providing analysis).

26 **e. Resolution of a New Criminal Law Violation is Not Required**

27 The trial court’s role in a hearing on the prosecution’s motion to revoke a pretrial diversion
28 agreement is to determine whether the prosecution has proven a violation of a pretrial diversion agreement
by a preponderance of evidence.

1 Often, one of the prosecution’s allegations for asserting a breach of a pretrial diversion agreement
2 concerns a defendant’s violation of the criminal law.

3 A defendant may assert that the new criminal law violation is merely an allegation of criminal
4 conduct entitling the defendant to continue or delay the motion to revoke the pretrial diversion agreement
5 until the new criminal law violation allegation is resolved. While the trial court has discretion to continue
6 a prosecution’s motion to revoke a pretrial diversion agreement under this situation, such a decision was not
7 as contemplated by the parties nor specifically agreed to by the prosecution in the pretrial diversion
8 agreement.

9 The issue is whether the prosecution has proven a subsequent violation of the criminal law by a
10 preponderance of the evidence. A defendant’s acquittal on or dismissal of the new charges will not prohibit
11 the prosecution from going forward on the alleged breach of the pretrial diversion agreement nor prohibit
12 the trial court from finding that a breach occurred, allowing termination of the agreement and bench trial as
13 contemplated by the pretrial diversion agreement. *State v. Cyganowski*, 21 Wn. App. 119, 121, 584 P.2d
14 426 (Div. 2 1978) (no constitutional requirement that a trial be held prior to a revocation hearing on the same
15 acts; even if revocation hearing delayed, an acquittal would not prevent a revocation of probation due to the
16 differing standards of proof); *McGautha v. California*, 402 U.S. 183, 28 L. Ed.2d 711, 91 S. Ct. 1454
17 (1971); *Standlee v. Smith*, 83 Wn.2d 405, 518 P.2d 721 (1974); *State v. Kuhn*, 81 Wn.2d 648, 503 P.2d 1061
18 (1972).

19 Additionally, whether a defendant is ever “convicted” of the subsequent criminal law violation is
20 inapposite since a pretrial diversion agreement does not require a defendant to “have no criminal law
21 convictions.” Since the form of the pretrial diversion agreement was patterned after Washington’s deferred
22 prosecution statute, RCW 10.05, it is instructive to examine when a defendant may be revoked from a
23 deferred prosecution based upon a new criminal law violation.

24 RCW 10.05.100 specifically requires the trial court to remove a defendant from the deferred
25 prosecution file and proceed to judgment pursuant to RCW 10.05.020 if a defendant is subsequently
26 “convicted” of a similar offense while in a deferred prosecution program. A “conviction” is a judgment that
27 the accused is guilty as charged. *State v. Kuhn*, 74 Wn. App. 787, 791-92, 875 P.2d 1225, *review denied*,
28 127 Wn.2d 1017 (Div. 2 1994) (trial court need not wait until subsequent conviction has been fully reviewed
and upheld on appeal to revoke deferred prosecution based upon subsequent conviction; “To hold otherwise

1 would mean that a petitioner subsequently convicted of a similar offense could avoid revocation and,
2 therefore, punishment, until the subsequent conviction had completed appellate review. Such an
3 interpretation does little to protect the public from the risks presented by the deferred prosecution petitioner
4 who continues to use intoxicants in violation of the petitioner’s deferred prosecution conditions.”; citing to
5 *Black’s Law Dictionary* for definition of conviction).

6 While the sole fact that a defendant is arrested for a subsequent criminal law violation is insufficient
7 to prove a failure to maintain “good behavior,” *Seattle v. Lea*, 56 Wn. App. 859, 786 P.2d 798 (Div. 1 1990)
8 (if the only evidence of a criminal law violation was the fact of an arrest, the evidence is insufficient to
9 support a probation violation; some underlying evidence concerning the basis of alleged criminal law
10 violation is required), proof that a defendant was “convicted” is not required to show a criminal law
11 “violation.”

12 Unlike the word “conviction” which requires a judgment that an accused is guilty, “violation” means
13 a breach of a right, duty or law. *Black’s Law Dictionary* 1741 (4th ed. 1968).

14 The prosecution need not prove a “conviction” of the criminal law to successfully seek revocation
15 of a pretrial diversion agreement by a defendant’s failure to have “no criminal law violations.” A violation
16 is shown with proof by a preponderance of the evidence that a defendant “breached” the criminal law.

17 A continuance to allow a defendant to litigate his or her new criminal law violation serves no purpose
18 as contemplated by the parties when they enter a pretrial diversion agreement.¹ A defendant promises to
19

20 ¹ None of the defendant’s constitutional rights are violated by going forward with defendant’s
21 PDA revocation hearing while charges are pending pertaining to same subject matter. *See*
22 *generally, United States v. Rilliet*, 595 F.2d 1138, 1140 (9th Cir. 1979) (going forward with
23 defendant's probation revocation hearing while charges were pending pertaining to same subject
24 matter did not constitute a deprivation of any of the defendant's constitutional rights); *Ryan v.*
25 *State of Montana*, 580 F.2d 988, 992-93 (9th Cir. 1978), *cert. denied*, 440 U.S. 977 (1979)
26 (defendants can properly be required to make difficult strategic choices that necessarily result in
27 relinquishing a constitutional right; a procedure which allows statements made by a defendant in
28 an effort to mitigate his responsibility and reduce his punishment in a parole revocation hearing
to be used against him as evidence of his guilt or innocence in a pending criminal proceeding that
arises from the same act that forms the basis of the alleged probation violation is not a cruel
choice which implicates the self-incrimination clause of the Fifth Amendment); *United States v.*
Brugger, 549 F.2d 2, 4 (7th Cir.), *cert. denied*, 431 U.S. 919 (1977) (court need not grant a
defendant a continuance of a probation revocation hearing until after disposition of the criminal
charge on which the revocation is based, notwithstanding defendant's claim that he could not
testify at the revocation hearing except at the sacrifice of his Fifth Amendment privileges upon
which he had the right to rely in the subsequent trial on the new charge.)

1 abide by various conditions, and if he or she successfully does so, the prosecution promises to amend or
2 dismiss the charge(s).

3 There could be no more clear evidence of the parties' intent to proceed to a relatively quick
4 disposition of a prosecution's motion to revoke a pretrial diversion agreement than the provisions concerning
5 a defendant's failure to appear at a subsequent revocation hearing or trial. A defendant, as part of any
6 pretrial diversion agreement, waives his or her right to be present in court at a subsequent revocation or trial
7 by his or her failure to appear. This provision of the agreement allows the prosecution to proceed to
8 judgment by trial in absentia precisely because the parties contemplate minimal delay from the allegation
9 of a breach of a pretrial diversion agreement through resolution of the alleged breach.

10 **2. The Prosecution's Decision to Terminate the PDA was "Not Unreasonable"**

11 Once the trial court has resolved the factual disputes concerning whether a violation of the pretrial
12 diversion agreement occurred, the trial court should assess the reasonableness of the prosecution's decision
13 to terminate the pretrial diversion agreement.

14 ...Clearly, the court is not in a position to require that prosecution be recommended.
15 Discretion to finally bring the case to trial still rests with the prosecutor. Other options may
16 still be open in a particular case, such as reducing charges if a plea bargain is reached,
17 offering a new diversion agreement, or dismissing charges where appropriate. We therefore
18 hold that the court's review of a prosecutor's termination decision should consist of assessing
19 its reasonableness in light of the facts the trial court determines at hearing.

20 *Marino*, 100 Wn.2d at 725-26.

21 The trial court's decision upon reviewing the reasonableness of the prosecution's decision to
22 terminate a pretrial diversion agreement is "more like a legal conclusion, or a mixed question of fact and
23 law, than an additional finding of fact." *State v. Kessler*, 75 Wn. App. 634, 639, 879 P.2d 333 (Div. 1 1994).
24 While the trial court may not agree with the prosecution's decision to terminate the agreement, the trial
25 court's function is to determine if the prosecutor's decision to terminate was "not unreasonable." *Id.*

26 A prosecutor's decision to terminate a pretrial diversion agreement for nonpayment of therapy bills
27 will not be upheld as reasonable where the underlying problem is hardship and inability to pay, *United States*
28 *v. Snead*, 822 F. Supp. 885, 888 (D. Conn. 1993). A willful non-payment, though, resulting from a
defendant's choice to make this financial obligation a low priority will support the decision to terminate the
agreement. *Kessler*, 75 Wn. App. at 640.

"...The determination as to whether termination is reasonable for these violations is analogous to the
determination in a breach of contract case of whether a breach is material, thus warranting a remedy. It

1 depends on the circumstances of each particular case.” *Kessler*, 75 Wn. App. at 640-41.

2 A violation of a pretrial diversion agreement need not be criminal in nature to justify termination.
3 The issue for the trial court to determine is the materiality of the violations to the intent of the parties when
4 the agreement was entered, which inherently depends on the particular provisions of the pretrial diversion
5 agreement. *Kessler*, 75 Wn. App. At 641.

6 **3. The Prosecution has Established Beyond a Reasonable Doubt that the Defendant is**
7 **Guilty of the Charges that were the Subject of the PDA**

8 The Kitsap County Prosecutor’s Office’s pretrial diversion agreement clearly sets forth what will
9 occur if the prosecution’s decision to terminate or revoke the pretrial diversion agreement is approved by
10 the trial court.

11 In exchange for the prosecution’s agreement to amend or dismiss the charges upon the defendant’s
12 satisfying various conditions, PDA, Prosecution’s Agreement, pp. 2-3, the defendant agrees to waive his or
13 her speedy trial and jury trial rights, stipulate to the admissibility of the police reports and other materials
14 submitted by the prosecution, and stipulate that the defendant “wishes to submit the case on the record and
15 stipulates that sufficient facts exist for a finding of guilt.” The defendant also waives his or her right to hear
16 and question witnesses, the right to call witnesses in his or her own behalf, and the right to testify or not to
17 testify. Pretrial Diversion Agreement, Defendant’s Agreement, pp. 1-2. *See* substantially similar language
18 of CrRLJ 6.1.2(b) (Statement of Defendant on Submittal or Stipulation to Facts) which is specifically
19 referenced in the pretrial diversion agreement.

20 ...[a] guilty plea...is functionally and qualitatively different from a stipulation. A guilty plea
21 generally waives the right to appeal. A guilty plea has been said to be “itself a conviction;
nothing remains but to give judgment and determine punishment.”

22 A stipulation, on the other hand...is only an admission that if the State’s witnesses
23 were called, they would testify in accordance with the summary presented by the prosecutor.
24 The trial court must make a determination of guilty or innocence. More importantly, a
stipulation preserves legal issues for appeal and can operate to keep potentially prejudicial
matters from the jury’s consideration.

25 *State v. Johnson*, 104 Wn.2d 338, 341, 705 P.2d 773 (1985) (Citations omitted.); *See also State v. Smith*,
26 134 Wn.2d 849, 953 P.2d 810 (1998); *State v. Mierz*, 127 Wn.2d 460, 469, 901 P.2d 286 (1995); *State v.*
27 *Halgren*, 87 Wn. App. 525, 531-32, 942 P.2d 1027 (Div. 1 1997), *reversed on other grounds*, 137 Wn.2d
28 340, 971 P.2d 512 (1999).

Once a trial court finds that a violation of the pretrial diversion agreement occurred by a

1 preponderance of the evidence, and that the prosecution’s decision to terminate the agreement was “not
2 unreasonable,” the pretrial diversion agreement makes clear that the case proceeds to a bench trial based
3 upon stipulated evidence and the defendant’s admission that sufficient facts exist for a finding of guilt.

4 **a. Waiver of the Defendant’s Right to be Present -Motion to Revoke and/or Trial in Absentia**

5 A criminal defendant’s failure to appear for trial is not considered a valid waiver of his or her court
6 rule right to be present. *Crosby v. United States*, 506 U.S. 255, 113 S. Ct. 748, 753, 122 L. Ed.2d 25 (1993)
7 (Federal Rule of Criminal Procedure 43. Court refuses to reach issue whether trial in absentia is prohibited
8 by the Constitution); *United States v. Mezzanatto*, 513 U.S. 196, 115 S. Ct. 797, 802, 130 L. Ed.2d 697
9 (1995) (explaining that Crosby held that a defendant’s failure to appear for trial cannot be considered a valid
10 knowing and voluntary waiver of the court rule right to be present for trial); *State v. Hammond*, 121 Wn.2d
11 787, 790-91, 854 P.2d 637 (1993) (Crosby’s textual analysis of FRCP 34 found persuasive, and adopted for
12 interpretation of CrR 3.4; Court refuses to reach issue whether trial in absentia is prohibited by the
13 Constitution).

14 A defendant’s mid-trial flight, though, acts as a knowing and voluntary waiver of the right to be
15 present, and the trial may proceed without the defendant’s presence. *Crosby*, 113 S. Ct. at 751-53.

16 ..Moreover, a rule that allows an ongoing trial to continue when a defendant disappears
17 deprives the defendant of the option of gambling on an acquittal knowing that he can
18 terminate the trial if it seems that the verdict will go against him-an option that might
otherwise appear preferable to the costly, perhaps unnecessary, path of becoming a fugitive
from the outset.

19 *Crosby*, 113 S. Ct. at 753.

20 Like the most fundamental constitutional protections afforded a criminal defendant, any court rule
21 is subject to a defendant’s knowing and voluntary waiver with court permission. *Mezzanatto*, 115 S. Ct. at
22 801-02 (string cite of cases showing a criminal defendant’s ability to knowingly and voluntarily waive
23 double jeopardy, privilege against compulsory self-incrimination, right to jury trial, right to confront one’s
24 accusers, and right to counsel).

25 The state and federal constitutional rights to be present at trial may be waived, provided the waiver
26 is voluntary and knowing. *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 146
27 A.L.R. 357 (1938); *State v. Rice*, 110 Wn.2d 577, 619, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109
28 S. Ct. 3200, 105 L. Ed.2d 707 (1989); *State v. Thompson*, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994) (trial
court’s decision to continue with trial when defendant took flight after the trial had begun is affirmed).

1 Section 4 of the pretrial diversion agreement makes clear that a defendant understands he or she shall
2 be present in court at all future court hearings, and that the trial court may proceed with a motion to revoke
3 the pretrial diversion agreement and trial if the defendant fails to appear as required.

4 By agreeing to a pretrial diversion agreement, a defendant knowingly and voluntarily waives his or
5 her right to be present at a hearing on the prosecution’s motion to revoke a pretrial diversion agreement or
6 subsequent trial if the defendant fails to appear for those hearings after notice of the hearing date “is sent
7 to the Defendant’s attorney or the Defendant’s last known address if the Defendant is not represented by an
8 attorney.” Pretrial Diversion Agreement, Section 4, Presence of the Defendant.

9 A trial court may proceed with a motion to revoke a pretrial diversion agreement and subsequent trial
10 if a defendant fails to appear after notice of the motion is sent as required by the pretrial diversion agreement.

11 **b. The Case at Bar**

12
13 [insert analysis]

14 RESPECTFULLY submitted this ___ day of _____, _____.

15
16
17 _____
18 WSBA No.
19 Deputy Prosecuting Attorney
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IN THE
FOR

DISTRICT/MUNICIPAL COURT
COUNTY, STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff,

-vs-

Defendant.

NO.

**NOTICE OF INELIGIBILITY TO
POSSESS FIREARM**

TO THE ABOVE-NAMED DEFENDANT:

You are hereby advised that you have been convicted of the following crime(s) committed by a family or household member, RCW 10.99.020(1), against another on or after July 1, 1993:

- assault in the fourth degree
- coercion
- criminal trespass in the first degree
- reckless endangerment in the second degree
- stalking
- violation of the provision of a no contact order or protection order restraining the person or restraining the person from going on to the grounds of or entering a residence (RCW 26.50.060, 26.50.070, 26.50.130 or 10.99.040)

YOU ARE ADVISED THAT YOU MAY NOT OWN, POSSESS, OR CONTROL ANY FIREARM UNTIL YOUR RIGHT HAS BEEN RESTORED BY A COURT OF RECORD. VIOLATION IS A FELONY UNDER RCW 9.41.040. YOU MUST IMMEDIATELY SURRENDER ANY CONCEALED PISTOL LICENSE ISSUED IN YOUR NAME.

This document has been read by the defendant and is effective this ____ day of _____ 1999.

JUDGE

Copy Received:

DEFENDANT'S FULL NAME

DEFENDANT'S DATE OF BIRTH

DEFENDANT'S DRIVER'S LICENSE/ID#

1
2
3 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR _____ COUNTY

4
5 STATE OF WASHINGTON,

6 Plaintiff,

NO.

7 -vs-

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR
EXCEPTIONAL SENTENCE

8
9 Defendant.

10 THIS MATTER having come before the above-entitled Court as a sentencing hearing; the
11 Plaintiff, State of Washington, appearing by and through its attorney of record, below named; and the
12 defendant, _____, appearing in person and through his counsel of record, below named; and the
13 Court having considered the testimony of the witnesses, the statements of counsel, and the record and
14 file in this cause, now makes the following:

14 **FINDINGS OF FACT**

15 I.

16 The defendant has been convicted of assault in violation of no contact order. The defendant's
17 standard range is up to 12 months incarceration. The statutory maximum is five years' incarceration.

18 From the foregoing Findings of Fact, the Court now makes and enters the following:

18 **CONCLUSIONS OF LAW**

19 I.

20 That the above-entitled Court has jurisdiction over the parties and the subject matter of this
21 action.

22 II.

23 There are substantial and compelling reasons to impose an exceptional sentence of a Certified
24 Domestic Violence Perpetrators Treatment Program and extended supervision long enough for defendant
25 to complete the treatment program as set out in the judgment and sentence.

26 III.

27 The exceptional sentence is justified by the following:

- 28 (a) This condition is stipulated to by the parties, in accordance with State v. Hilyard, 63 Wn.
App. 413 (1991), *rev. denied*, 118 Wn.2d 1025 (1992).
- (b) The current offense was committed against a family or household member as defined in
RCW 10.99.020, to wit: Jane Doe
- (c) The legislature has found that Domestic Violence Perpetrator Treatment as defined by
RCW 26.50.150 and WAC 388-60 should be imposed as a crime-related prohibition to
reduce the likelihood of additional domestic violence incidents.

IV.

The grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the exact same sentence even if only one of the grounds listed in the preceding paragraph is valid.

DONE IN OPEN COURT this ____ day of _____, _____.

J U D G E

PRESENTED BY:

APPROVED FOR ENTRY:

WSBA
Deputy Prosecuting Attorney

WSBA
Attorney for Defendant

1 IN THE SUPERIOR COURT FOR

COUNTY, STATE OF WASHINGTON

2
3 STATE OF WASHINGTON,

4 Plaintiff,

NO.

5 -vs-

ORDER OF RELEASE PENDING
APPEAL

6
7 Defendant.

8 THE Court having found by a preponderance of the evidence, as required by RCW 9.95.062,
9 that: (1) the defendant is not likely to flee or to pose a danger to the safety of any other person or the
10 community if the judgment is stayed; (2) the delay resulting from the stay will not unduly diminish
11 the deterrent effect of the punishment; (3) a stay of the judgment will not cause unreasonable trauma
12 to the victims of the crime or their families; and (4) the defendant has undertaken to the extent of the
13 defendant's financial ability to pay the financial obligations under the judgment or has posted an
adequate performance bond to assure payment:

14 ORDERS that execution of the judgment is stayed pursuant to RAP 7.2(f) pending
15 appeal with the following conditions and exceptions:

- 16 1. The defendant shall post cash bail or a surety bond in the amount of \$ _____.
17 This bail shall secure the defendant's appearance and, if condition 2 is not in effect,
18 shall also secure payment of financial obligations. The defendant shall remain in
19 custody until bail is posted.
- 20 2. The defendant shall make payments towards court-ordered legal financial obligations
21 imposed in the judgment and sentence of not less than \$ _____ a month, beginning
22 on the ____ day of _____, _____. All payments do made are to be held by
23 the clerk of the court until further order of this court.
- 24 3. The provisions of the Judgment and Sentence that prohibit contact with specified
25 persons shall remain in effect. Violation of this order is a criminal offense under
26 chapter 10.99 RCW and will subject a violator to arrest.
- 27 4. The defendant shall report to the Department of Corrections, remain under the
28 supervision of a community corrections officer, and follow the instructions, rules and
regulations of the Department and the following:
 - All conditions of the community supervision or community placement set out
in the Judgment and Sentence are incorporated as conditions of release;
 - Defendant is not to leave: _____ without prior written
approval of this Court;
 - Defendant shall during the period of release live at:

Such address shall not be changed without the written permission of the Court
or the Department of Corrections.

- Defendant shall not possess any dangerous weapons.
- Defendant shall not drink or possess intoxicating liquors and shall not go to any
establishment wherein alcoholic beverages are the chief item of sale.
- Defendant shall not use or possess any drugs except those prescribed by a

1 physician.

2 [] Defendant, driver's license no. _____, shall not operate a motor
3 vehicle that is not equipped with an ignition interlock system set to the
4 specifications contained in the supplemental order. This condition shall be
immediately reported by the Kitsap County Clerk's Office to the Department of
Licensing (vehicular assault or vehicular homicide cases).

5 [] 5. The defendant shall have no arrests or criminal law violations.

6 [] 6. The defendant shall diligently prosecute the appeal.

7 [] 7. The defendant shall report to jail to serve any sentence of incarceration pending appeal
within ____ days of the issuance of a mandate by the appellate court that affirms the
conviction or dismisses the appeal.

8 [] 8. _____

9
10 DATED: _____ JUDGE _____

11 DEFENDANT'S ACKNOWLEDGMENT

- 12 1. I have read the above conditions of release and any other conditions of release that may be
13 attached;
- 14 2. I agree to follow the above conditions and understand that any violation may lead to the
15 forfeiture of any bond posted and/or to the immediate imposition of my sentence and/or to the
issuance of a warrant for my immediate arrest, and that I may be charged with a separate
crime;
- 16 3. I understand that a law enforcement officer having probable cause to believe that I am about to
17 leave this state or that I have violated a condition of my release, may arrest me and bring me
immediately before the Court;
- 18 4. I understand that a failure to appear when required by this Court is a crime;
- 19 5. I understand that a failure to appear when required by this Court or a failure to report to my
20 community corrections officer can result in the dismissal of my appeal by the court of appeals;
- 21 6. I have received a copy of this order.

22 DATED: _____ DEFENDANT'S SIGNATURE _____

23
24 _____ DEFENDANT'S STREET ADDRESS
DEFENDANT'S ATTORNEY
WSBA NO.

25 _____
CITY STATE ZIP

26 PROSECUTING ATTORNEY
WSBA NO.

27 _____
DEFENDANT'S PHONE NUMBER

1 IN THE DISTRICT COURT OF THE STATE OF WASHINGTON FOR _____ COUNTY

2
3 STATE OF WASHINGTON,

4 Plaintiff,

NO.

5 -vs-

ORDER OF RELEASE PENDING
APPEAL

6
7 Defendant.

8 THE Court having found by a preponderance of the evidence, as required by RCW 9.95.062,
9 that: (1) the defendant is not likely to flee or to pose a danger to the safety of any other person or the
10 community if the judgment is stayed; (2) the delay resulting from the stay will not unduly diminish
11 the deterrent effect of the punishment; (3) a stay of the judgment will not cause unreasonable trauma
12 to the victims of the crime or their families; and (4) the defendant has undertaken to the extent of the
13 defendant's financial ability to pay the financial obligations under the judgment or has posted an
14 adequate performance bond to assure payment:

ORDERS that execution of the judgment is stayed pursuant to RALJ 4.3(b) pending appeal
with the following conditions and exceptions:

- 15 [] 1. The defendant shall post cash bail or a surety bond in the amount of \$ _____.
16 This bail shall secure the defendant's appearance and, if condition 2 is not in effect,
17 shall also secure payment of financial obligations. The defendant shall remain in
custody until bail is posted.
- 18 [] 2. The defendant shall make payments towards court-ordered legal financial obligations
19 imposed in the judgment and sentence of not less than \$ _____ a month, beginning
20 on the _____ day of _____, _____. All payments do made are to be held by the clerk of the court
until further order of this court.
- 21 [] 3. The provisions of the Judgment and Sentence that prohibit contact with specified
22 persons shall remain in effect. Violation of this order is a criminal offense under
chapter 10.99 RCW and will subject a violator to arrest.
- 23 [] 4. The defendant shall report to the Probation Department, remain under the supervision
24 of a probation officer, and follow the instructions, rules and regulations of the
Probation Department and the following:
 - 25 [] Defendant is not to leave: _____ without prior written
approval of this Court;
 - 26 [] Defendant shall during the period of release live at: _____
 - 27
 - 28 Such address shall not be changed without the written permission of the Court
or the Probation Department.
 - [] Defendant shall not possess any dangerous weapons.

[] Defendant shall not drink or possess intoxicating liquors and shall not go to any establishment wherein alcoholic beverages are the chief item of sale.

[] Defendant shall not use or possess any drugs except those prescribed by a physician.

[] Defendant, driver's license no. _____, shall not operate a motor vehicle that is not equipped with an ignition interlock system set to the specifications contained in the supplemental order. This condition shall be immediately reported by the Clerk's Office to the Department of Licensing.

[] 5. The defendant shall have no arrests.

[] 6. The defendant shall diligently prosecute the appeal.

[] 7. The defendant shall report to jail to serve any sentence of incarceration pending appeal within ____ days of the issuance of a ruling or opinion by the appellate court that affirms the conviction or dismisses the appeal.

[] 8. _____

DATED: _____ JUDGE _____

DEFENDANT'S ACKNOWLEDGMENT

- 1. I have read the above conditions of release and any other conditions of release that may be attached;
- 2. I agree to follow the above conditions and understand that any violation may lead to the forfeiture of any bond posted and to the issuance of a warrant for my immediate arrest, and that I may be charged with a separate crime;
- 3. I understand that a law enforcement officer having probable cause to believe that I am about to leave this state or that I have violated a condition of my release, may arrest me and bring me immediately before the Court;
- 4. I understand that a failure to appear when required by this Court is a crime;
- 5. I understand that a failure to appear when required by this Court or a failure to report to my Probation Officer can result in the dismissal of my appeal;
- 6. I have received a copy of this order.

DATED: _____ DEFENDANT'S SIGNATURE _____

DEFENDANT'S ATTORNEY WSBA NO. DEFENDANT'S STREET ADDRESS

PROSECUTING ATTORNEY WSBA NO. CITY STATE ZIP

DEFENDANT'S PHONE NUMBER