No. 45736-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Allen Proshold,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-01004-3

The Honorable Judge Marilyn K. Haan

Appellant's Opening Brief

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1. The trial court denied Mr. Proshold his Sixth and Fourteenth Amendment right to counsel.

2. The trial judge erred by failing to inquire into the extent of the conflict between Mr. Proshold and his court-appointed attorney.

> **ISSUE 1:** An accused person who is indigent has a constitutional right to appointed counsel. When alerted to Mr. Proshold's dissatisfaction with his court-appointed attorney, the trial court failed to make any inquiry into the breakdown of the attorney-client relationship. Did the court's failure to inquire into the attorney-client relationship violate Mr. Proshold's Sixth and Fourteenth Amendment right to counsel?

3. Mr. Proshold's kidnapping conviction infringed his Fourteenth Amendment right to due process.

4. The court's instructions relieved the state of its burden to prove the essential elements of first-degree kidnapping.

5. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.

6. The courts instructions relieved the state of its burden to prove that Mr. Proshold "abducted" someone within the meaning of RCW 9A.40.010.

7. The trial court erred by giving Instruction No. 22.

> **ISSUE 2:** A trial court's instructions must make the relevant legal standard manifestly clear to the average juror. Here, the trial court gave the jury an ambiguous definition of the word "abduct," allowing jurors to convict even absent proof that Mr. Proshold restrained Pruett. Did the instructions relieve the prosecution of its burden to prove the essential elements of first-degree kidnapping in violation of Mr. Proshold's Fourteenth Amendment right to due process?

8. The trial court erred by imposing attorney fees.

9. The trial court's imposition of attorney fees infringed Mr. Proshold's Sixth and Fourteenth Amendment right to counsel.

10. The court erred by adopting Finding of Fact No. 2.5 (Judgment and Sentence).

ISSUE 3: A trial court may only impose attorney fees after finding that the offender has the present or likely future ability to pay. Here, the court imposed $825 in attorney fees but failed to conduct any inquiry into whether Mr. Proshold could afford to pay the amount. Did the trial court violate Mr. Proshold's Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Allen Proshold and Kristy Pruett dated on and off for three or four years. RP 98. In the late summer of 2013, they were together and living in Mr. Proshold's van. RP 99-100, 319, 348. Each used their controlled substance of choice: Pruett was addicted to heroin, having lost her job as a surgical nurse years before due to drug thefts and use, and Mr. Proshold used methamphetamine. RP 94-100, 121-123, 133, 322.

Mr. Proshold had all of his possessions in his van, and knew that he had a warrant. RP 133, 320. He knew of several locations in Cowlitz County where he could safely park his van, and moved among them. He wanted to avoid arrest, since it would mean that his van would be impounded and he would not be able to afford to pay the fee to get it back. RP 324-326.

On August 1, 2013, Mr. Proshold and Pruett drove to her heroin dealer's house to get heroin for Pruett. RP 100-101, 321. She went inside for a time, and then returned to Mr. Proshold in the van. RP 101, 121, 324. They drove away and Pruett started yelling out the window for help. RP 112, 325, 355. She had done this before – in fact, Mr. Proshold was aware that she had been involuntarily committed in the past, so he sought to park in a safe place then see to her. RP 40-42, 362, 382.

By the time the van arrived at Mr. Proshold's friend's house, Pruett had been seen and heard, and two men had followed the van to see to her safety. RP 137-185, 269, 327. Knowing the police were on their way, Mr. Proshold hid at first, but later came out and was arrested. RP 165, 195, 332, 334.

Pruett claimed that Mr. Proshold ripped off her clothes, choked her, refused to stop the van so she could get out, slammed her head into the dashboard, and put his hand inside her vagina to search for money.[1] She asserted he did all these things while still driving the van. RP 105-113, 126-127, 134, 150, 259-260, 278.

The state charged Mr. Proshold with rape 2, attempted robbery 2, assault 2 and kidnapping 1. CP 1-3. He faced a life sentence if convicted. RP 1.

The week before the case was set to go to trial, Mr. Proshold asked for a new attorney. He told the court that his attorney was "incompetent" and "derelict", explaining that he had asked his attorney to contact three witnesses and it had not been done. RP 1-2. The attorney agreed he had more work to do on the case to be ready for trial. RP 2-3. The judge asked the defense attorney if he felt he could continue to represent Mr. Proshold. Counsel responded in the affirmative. RP 7. The court continued the trial,

for other reasons. The judge told Mr. Proshold to talk with his attorney, advised him that he could "bring that again," and said "[i]f you want to come back, we'll chat about it again." RP 7.

At trial, the court gave the following definitions relating to the kidnap charge:

> Abduct means to restrain a person by either secreting or holding the person in a place where that person is not likely to be found or using or threatening to use deadly force
>
> Restrain means to restrict another person's movements without consent and without legal authority in a manner that interferes substantially with that person's liberty.
>
> CP 29.

The jury acquitted Mr. Proshold of the rape and attempted robbery charges. CP 36, 39. At sentencing for the kidnap and assault convictions, the court signed an order which included the following preprinted on the form:

> 2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay financial legal obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.
>
> CP 45.

Mr. Proshold timely appealed. CP 56-70.

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[1] Mr. Proshold denied all of her allegations. RP 335-338.

ARGUMENT

I. THE TRIAL JUDGE VIOLATED MR. PROSHOLD'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A trial court's refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). A court "necessarily abuses its discretion" by violating an accused person's constitutional rights. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

A trial court, likewise, abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*, 310 F.3d 1231, 1248-1250 (10th Cir, 2002); *see also State v. Lopez*, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel,* 136 Wn.2d 629, 965 P.2d 1072 (1998). The reviewing court considers three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Id.*

B. The trial judge infringed Mr. Proshold's right to counsel by failing to inquire into the breakdown of the attorney-client relationship.

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused's Sixth Amendment right, even in the absence of prejudice. *Cross*, 156 Wn.2d at 607. To compel an accused to proceed "with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.'" *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979) (quoting *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)).

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross,* 156 Wn.2d at 607-610; *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008). An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Cross,* 156 Wn.2d at 610.

The court "must conduct 'such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern.' ...The inquiry must also provide a 'sufficient basis for reaching an informed decision.'" *United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001). Furthermore, "in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." *Adelzo-Gonzalez,* 268 F.3d at 776-777. The focus should be

on the nature and extent of the conflict, not on whether counsel is minimally competent. *Adelzo-Gonzalez,* 268 F.3d at 776-777.

In this case, the trial court learned that Mr. Proshold did not want to proceed with his court-appointed lawyer. RP 1-3. Mr. Proshold called his attorney an "incompetent goob." RP 1. He told the court his attorney was "derelict in his duties," and described some of the problems. RP 1-2. He described counsel's representation as "inadequate," and specifically asked for another attorney. RP 2. When counsel assured the judge that he could still work with his client, Mr. Proshold said "I have no confidence in him left." RP 7.

The trial judge should have asked specific and targeted questions, encouraging Mr. Proshold to fully air his concerns. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779. The Sixth Amendment required the court to develop an adequate basis for a meaningful evaluation of the problem and an informed decision. *Cross,* 156 Wn.2d at 610; *Adelzo-Gonzalez,* 268 F.3d at 776-779.

Instead, the judge told Mr. Proshold he could raise the issue again, but never told him how to go about doing so. The next time Mr. Proshold was brought to court was just a few days before the start of trial. Clerk's Minutes from 11/14/13, Supp. CP. At that point he'd already waived his right to speedy trial, and allowed the case to be continued beyond his

initial speedy trial expiration date. RP 5-7. By failing to inquire when the issue was brought to the court's attention, the judge forced Mr. Proshold into a position where he had to choose between delaying the case further (by raising the issue again) or proceeding to trial with an attorney in whom he had no confidence.

The trial court's failure to conduct a meaningful inquiry into Mr. Proshold's concerns denied Mr. Proshold's Sixth Amendment right to counsel. *Cross,* 156 Wn.2d at 607. His convictions must be vacated and the case remanded for a new trial.[2] *Id.*

II. MR. PROSHOLD'S KIDNAPPING CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS ALLOWED CONVICTION WITHOUT PROOF OF ABDUCTION.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *Zillyette*, 178 Wn.2d at 161. A manifest error affecting a constitutional right may be

[2] In the alternative, the case must be remanded for a hearing to explore the nature and extent of the conflict and for a new trial if the conflict was sufficient to require appointment of new counsel. *See, e.g., Lott,* 310 F.3d at 1249-1250 (failure to adequately inquire requires remand for a hearing to determine extent of the conflict).

addressed for the first time on review.[3] RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009).

The adequacy of jury instructions is reviewed *de novo*. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Instructions create a manifest error affecting a constitutional right if they can be construed to relieve the state of its burden to prove every element of an offense. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

B. The court's instructions allowed conviction without proof that Mr. Proshold abducted Pruett.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). The elements of first-degree kidnapping require proof that the accused person "intentionally abduct[ed] another person..." RCW 9A.40.020(1).

RCW 9A.40.010(1) defines "abduct" as follows: "'Abduct' means to restrain a person by either (a) secreting or holding him or her in a place

[3] The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); *see State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

where he or she is not likely to be found, or (b) using or threatening to use deadly force.'" RCW 9A.40.010(1). The statutory definition unambiguously requires proof of restraint, accomplished by one of two alternative methods, (a) and (b).

In this case, the court's instruction defining "abduct" altered the punctuation and organization of the definition. CP 29. Instead of using the format and punctuation set forth in the statute, the court told jurors that "Abduct means to restrain a person by either secreting or holding the person in a place where the person is not likely to be found or using or threatening to use deadly force." CP 29.

The court's changes rendered the definition ambiguous. A reasonable juror could read the court's definition in a manner that differs significantly from the statutory definition. Specifically, a reasonable juror could read the court's ambiguous instruction and believe that

> "Abduct" means (a) to restrain a person by either secreting or holding the person in a place where the person is not likely to be found, or (b) using or threatening to use deadly force.

Under this reading of the instruction, a juror could vote to convict if Mr. Proshold used (or threatened to use) deadly force against Pruett, even without proof of restraint. CP 29-30. This relieved the prosecution of its burden to prove the essential elements of kidnapping. RCW 9A.40.010(1); RCW 9A.40.020(1).

The error was particularly harmful in this case, because Mr. Proshold testified that he did not restrain Pruett. RP 324-342. Some jurors might have believed his testimony that he didn't restrain her, but also believed Pruett's testimony that Mr. Proshold threatened or assaulted her. RP 105-111.

The court's instructions failed to make the relevant standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.[4] This relieved the state of its burden to prove that Mr. Proshold "abducted" Pruett. His kidnapping conviction must be reversed and the charge remanded for a new trial. *Id.*

III. THE COURT ERRED BY ORDERING MR. PROSHOLD TO PAY ATTORNEY FEES.

A. Standard of Review.

Reviewing courts assess constitutional issues and questions of law *de novo*. *Zillyette*, 178 Wn.2d at 161; *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013).

[4] This created a manifest error affecting Mr. Proshold's right to due process: some jurors might have voted to convict based on Mr. Proshold's use or threatened use of force, even if they believed the state failed to prove actual restraint. RCW 9A.40.010(1); RCW 9A.40.020(1). Accordingly, the issue can be addressed for the first time on review. RAP 2.5(a)(3). The court should review the error even if it does not qualify under RAP 2.5(a)(3). *Russell*, 171 Wn.2d at 122. The Rules of Appellate procedure require courts to decide cases on their merits "except in compelling circumstances where justice demands…" RAP 1.2(a). A decision on the merits here would promote justice; there is no compelling basis to refuse review on the merits. RAP 1.2(a).

B. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied,* 172 Wn.2d 1021, 268 P.3d 224 (2011).[5] A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. RCW 9.94A.760.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford,* 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also, State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[6]

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[5] *See also State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied,* 177 Wn.2d 1021, 304 P.3d 115 (2013).

[6] *See also, State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 29916-3-III, 2014 WL 1225910 (Wash. Ct. App. Mar. 25, 2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted,* 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenges to LFOs. *Id.* The cases do not govern Mr. Proshold's claim that the court lacked constitutional and statutory authority.[7]

C. The court violated Mr. Proshold's right to counsel by ordering him to pay the cost of his court-appointed attorney without first determining that he had the present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller,* the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

"established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

[7] The issue will likely be resolved when the Supreme Court issues its opinion in *Blazina.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

> The court *shall not order* a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.[8] *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay

[8] In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.*

Oregon's recoupment statute did not impermissibly chill the exercise of the right to counsel because "[t]hose who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay". *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to require a finding of ability to pay before ordering an offender to reimburse for the cost of counsel. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a

defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment"); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) ("The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn. Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions"); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) ("In view of *Fuller,* we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute").

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Here, none of the parties provided the court with information about Mr. Proshold's present or likely future ability to pay. RP 495-506. Although the court made a finding that Mr. Proshold "has the ability or likely future ability to pay," this finding is not supported by anything in the record. CP 45. Indeed, the court found Mr. Proshold indigent at beginning and at the end of the proceedings. CP 71-73. Mr. Proshold's felony conviction and lengthy incarceration will also negatively impact his prospects for employment.

The lower court ordered Mr. Proshold to pay $825 in fees for his court-appointed attorney without conducting any inquiry into his present or future ability to pay. This violated his right to counsel. Under *Fuller,* the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. Proshold to pay $825 in attorney fees must be vacated. *Id*

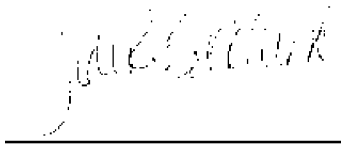
CONCLUSION

Mr. Proshold's kidnapping conviction must be reversed. The court's instructions allowed conviction without proof of all essential elements. The charge must be remanded for a new trial.

Alternatively, the order requiring payment of attorney fees must be vacated.

Respectfully submitted on June 3, 2014,

BACKLUND AND MISTRY



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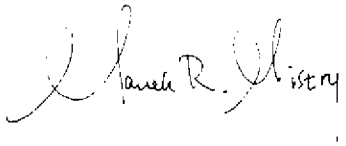

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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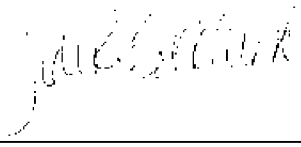
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 3, 2014.



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