SUPREME COURT NO. 92072-9
NO. 72892-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND JORDAN,

Appellant.

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

The Honorable Robert Lawrence-Berry, Judge

PETITION FOR REVIEW

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RULES, STATUTES, AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/DECISION BELOW

Raymond Jordan requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Jordan, No. 72892-0-I, filed May 4, 2015. A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

An accused person is entitled to have the jury instructed regarding the lawful use of force when there is any evidence the accused had a reasonable belief he was about to be injured and the force used was no more than necessary. Here, appellant woke to find himself being held down by paramedics and firefighters. Appellant resisted by swinging his fists, kicking, yelling at them to get off, and swearing at them. Eventually, police arrived and subdued him by punching him twice in the face. Appellant was taken to the hospital and no one else was injured. Did the court err in refusing to instruct the jury on self-defense as to the counts of assault against the paramedics and firefighter?

C. STATEMENT OF THE CASE

Jordan awoke on the floor of the men's restroom of the Yakima Public Library after emergency medical technicians (EMTs) applied "painful stimuli." RP 79-80. He found he was being held by the head without his consent. RP 122. He began punching and kicking, and when

EMTs and a firefighter tried to explain, he said, "Get the fuck off." RP 81, 83.

One of the paramedics testified that, if they had backed off when Jordan woke up, it was possible there would have been no "combat." RP 97. One of the firefighters testified it was apparent to him that Jordan did not want their help and was trying to get away. RP 140. Both EMTs understood from Jordan's conduct and statements that he wanted them to stop what they were doing to him. RP 97, 128. However, because he appeared incapacitated, they substituted their judgment for his and administered a sedative by injection. RP 93, 99.

Police officers arrived approximately six minutes after the EMTs and firefighters. RP 84, 86. Jordan continued to struggle by attempting to punch, kick, and bite. RP 87. Police eventually subdued Jordan by punching him twice in the face. RP 87-88.

Jordan was taken directly to the hospital because of his injuries. RP 68. No one else was injured. RP 172, 181-82. Jordan was convicted of five counts of third-degree assault, three against the EMTs and the firefighter, and two against the police officers. CP 5-6, 35-39. The trial court refused Jordan's request for jury instructions on self-defense/lawful use of force, ruling that the limited right to refuse unwanted medical treatment did not include the right to use force. RP 201; CP 8.

On appeal, Jordan argued the trial court erred in refusing his request for self-defense instructions for the three counts of assault pertaining to the EMTs and the firefighter. Brief of Appellant at 14; Reply Brief of Appellant at 5. The Court of Appeals affirmed Jordan's convictions, holding that he did not present evidence of the subjective fear required for instructions on self-defense. Slip op. at 6-7. The Court of Appeals also appears to have applied the heightened standard for self-defense when used against police officers. Slip op. at 7.

On July 2, 2015, the Court of Appeals denied Jordan's motion to reconsider. Jordan now asks this Court to grant review.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THOSE RESISTING UNWANTED MEDICAL TREATMENT MAY USE LIMITED FORCE TO DO SO.

"[U]nwanted contact, even if helpful in intent, can constitute assault." State v. Koch, 157 Wn. App. 20, 34-35, 237 P.3d 287 (2010) (citing State v. Elmi, 166 Wn.2d 209, 215-16, 207 P.3d 439 (2009)). A person is entitled to use force in defense to prevent "any assault," regardless of whether the assault actually threatens great bodily harm. State v. Kyllo, 166 Wn.2d 856, 866, 215 P.3d 177 (2009). The jury must be instructed on self-defense whenever there is "some evidence" that the

person may have acted out of reasonable fear. State v. McCreven, 170 Wn. App. 444, 462-63, 284 P.3d 793 (2012); State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004); State v. Miller, 89 Wn. App. 364, 367-68, 949 P.2d 821 (1997). A requested jury instruction on self-defense must be given unless "the defense theory is completely unsupported by evidence." State v. George, 161 Wn. App. 86, 100, 249 P.3d 202 (2011).

It was clear to the EMTs and firefighters that Jordan did not want their assistance and considered their treatment of him offensive or harmful. RP 97, 128, 140. The State conceded there was some testimony Jordan was trying to refuse the medical treatment that was being administered to him. Brief of Respondent at 17. That is all that is required to meet his burden of production for instructions on self-defense. See Miller, 89 Wn. App. at 367-68 (Self defense instructions required when a defendant produces "some evidence" demonstrating self-defense). Nevertheless, the court denied the requested instructions and the Court of Appeals affirmed. RP 201; Slip op. at 7.

Review is warranted because three aspects of the Court of Appeals' analysis are in conflict with prior decisions by the Court of Appeals and this Court. RAP 13.4(b)(1), (2). First, the court focused on the reasonableness of the EMTs' (i.e., the victims') conduct, despite State v. Graves, 97 Wn. App. 55, 982 P.2d 627 (1999), which indicates the reasonableness of the

victim's conduct is immaterial to whether there is evidence the defendant reasonably and actually feared harm. Second, the court applied a narrow focus to only one part of the interaction. See Slip op. at 6 (focusing lack of evidence of fear before the "first alleged incident of assault"). This rationale conflicts with case law such as Rodriguez, 121 Wn. App. at 185, holding that, in determining whether to grant self-defense instructions, courts must consider all the surrounding facts and circumstances. Third, the court generally failed to view the facts and circumstances in the light most favorable to Jordan, as required by numerous cases such as George, 161 Wn. App. at 95-96.

Finally, review should be granted for a fourth reason: the Court of Appeals appeared to apply the heightened standard for acting in self-defense against a police officer to this case involving EMTs and a firefighter. Slip op. at 6-7. Whether the EMTs and firefighter are akin to police officers effecting a lawful arrest for purposes of self-defense appears to be a question of first impression and implicates a substantial public interest. RAP 13.4 (b)(4).

a. Because a Person Is Entitled to Act on Appearances, the Victim's Reasonableness Is Immaterial to Whether There Is Some Evidence of Self-Defense.

Self-defense instructions are warranted when there is evidence of a "'subjective, reasonable belief of imminent harm from the victim.'"

Rodriguez, 121 Wn. App. at 185 (quoting State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996)). Once self-defense is raised, the question is whether the defendant's act was reasonable under the circumstances as they appeared to him. Id. Whether the victim's original use of force was also reasonable is "a completely separate inquiry from whether the [defender] was initially entitled to raise the claim of self-defense." Graves, 97 Wn. App. at 62-63 (emphasis added).

In Graves, the State argued there was insufficient evidence to instruct on self-defense because the defendant's father used reasonable force to discipline him. Id. at 62. But the court rejected this argument, declaring, "[T]he question of whether the father's own use of force was reasonable is a completely separate inquiry from whether the child was initially entitled to raise the claim of self-defense." Id. at 62-63. By analogy to Graves, whether the EMTs and firefighters were acting reasonably in their attempt to provide medical care is an entirely separate question from whether Jordan presented sufficient evidence he was acting in self-defense. In short, the reasonableness of the EMT's conduct is immaterial. The Court of Appeals' reliance on the reasonableness of the EMTs and firefighters, see slip op. at 6-7, is in conflict with Graves.

In justifying the EMTs and firefighters' conduct, the Court of Appeals also relied on RCW 70.96A.120(2). Slip op. at 6. But the

statute is also irrelevant. Under that statute, a *peace officer* is permitted to take an intoxicated and incapacitated person into custody. A peace officer is defined as "a law enforcement official of a public agency or governmental unit, and includes persons specifically given peace officer powers by any state law, local ordinance, or judicial order of appointment." RCW 70.96A.020(22).

EMTs and firefighters are not law enforcement officials and are, therefore, not peace officers. They were not statutorily entitled to take Jordan into custody. And even assuming the EMTs were designated by the county as custodians of intoxicated and incapacitated persons, the statute protects the custodian from civil or criminal liability. RCW 70.96A.120. It does not elevate them to the level of police officers effectuating a lawful arrest or remove an individual's right to self-defense.

Even if the statute applied to the EMTs and firefighters, it would still be irrelevant to the analysis in the opinion. The Court of Appeals' opinion holds there was no evidence of Jordan's subjective fear. Slip op. at 6-7. Whether the EMTs or the police officers had lawful authority to take him into custody under the statute has no bearing on his subjective fear.

It is well within the realm of possibility that both the EMTs' conduct was reasonable *and* that Jordan reasonably feared their unwanted physical contact and restraint. This was a dilemma the jury should have been asked to resolve. By focusing on the statutory authority for and reasonableness of taking Jordan into custody, the opinion in this case conflicts with Graves, 97 Wn. App 55, and review should be granted under RAP 13.4(b)(2).

b. The Court of Appeals Failed to Consider All the Surrounding Facts and Circumstances in Determining Whether Self-Defense Instruction Was Warranted.

In deciding whether self-defense instructions are warranted, courts must look at "'all the surrounding facts and circumstances'" from the accused person's perspective. Rodriguez, 121 Wn. App. at 185 (quoting LeFaber, 128 Wn.2d at 900). Yet the Court of Appeals opinion creates an artificial temporal distinction focusing solely on the time before Jordan threw the first punch, rather than on the circumstances as a whole. Slip op. at 6. This Court should grant review because the narrow temporal focus is not warranted for several reasons and is in direct conflict with Rodriguez. RAP 13.4(b)(2).

This entire incident took place over only a few minutes. From the moment the EMTs first encountered Jordan until they administered the injection was three minutes. RP 91-93. Thus, it is reasonable to use

statements Jordan made only moments later ("get the fuck off") to infer his earlier mindset when he threw the first punch. This reasonable inference is some evidence of fear that warranted instruction on self-defense.

In holding there was no evidence of subjective fear, the Court of Appeals also disregarded the EMTs' own statements. Both EMTs understood from Jordan's conduct and statements that he wanted them to stop what they were doing to him. RP 97, 128. In other words, his words and actions were evidence from which they inferred he deemed their contact to be offensive. Review is warranted because the Court of Appeals opinion disregards this evidence in contravention of Rodriguez' and LeFaber's mandate to consider all the surrounding facts and circumstances. 128 Wn.2d at 900; 121 Wn. App. at 185; RAP 13.4(b)(1), (2).

c. The Court of Appeals Failed to View the Facts in the Light Most Favorable to Jordan.

Review should be granted under RAP 13.4(b)(2) because the Court of Appeals opinion is in conflict with George, 161 Wn. App. at 95-96 and other cases requiring that facts supporting a self-defense instruction be viewed in the light most favorable to the defendant. RAP 13.4(b)(2).

The State conceded there was some testimony that Jordan was trying to refuse the medical treatment that was being administered to him. Brief of Respondent at 17. The EMTs and firefighter understood this to be the case. Yet they continued to impose unwanted physical contact on Jordan. That unwanted physical contact constituted assault. Koch, 157 Wn. App. at 20. A person being assaulted is entitled to use reasonable force in self-defense. Kyllo, 166 Wn.2d at 866. He is also entitled to act on appearances, even if he later turns out to be mistaken. Rodriguez, 121 Wn. App. at 185.

It should go without saying that aggression can be a sign of fear. Yet the Court of Appeals categorically rejected this inference holding that Jordan's "swinging and kicking alone is not evidence of subjective fear – only of unexplained aggression." Slip op. at 6.

It is apparent that the EMTs and firefighter were not actually attempting to harm Jordan. But the facts must be viewed not from their perspective, or ours, but from Jordan's. Rodriguez, 121 Wn. App. at 185. Would a reasonable person physically resist upon awaking from a drunken stupor to find him or herself being physically restrained? Would a reasonable person try to escape by throwing a punch or kicking when it is apparent that his wishes are being disregarded and medical treatment imposed by force? In terms of the amount of force, Jordan's force in

response to unwanted, offensive contact was actually *less* than necessary to prevent the assault.

Viewed in the light most favorable to Jordan, there was at least some evidence he used reasonable force to prevent what he reasonably perceived as imminent harmful or offensive contact. That is all that is required to meet his burden of production. See Miller, 89 Wn. App. at 367-68 (Self defense instructions required when a defendant produces "some evidence" demonstrating self-defense). Review should be granted under RAP 13.4(b)(2) because the Court of Appeals failed to view the facts in the light most favorable to Jordan, as required by George, 161 Wn. App. at 95-96.

d. The Heightened Standard for Police Officers Making a Lawful Arrest Should Not Apply to Medical Professionals Attempting to Provide Unwanted Treatment.

In general, to find self-defense, a subjective reasonable belief that harm is imminent is sufficient; the jury need not find actual imminent harm. Rodriguez, 121 Wn. App. at 185. However, a heightened standard applies when the person against whom force is used is a police officer. State v. Bradley, 141 Wn.2d 731, 737-38, 10 P.3d 358 (2000). This heightened standard also applies when force is used against corrections officers working in a prison because "the circumstances of persons using

force in self-defense against correctional officers are analogous to the situation of persons resisting arrest." Id. at 733.

Persons under arrest or confined in prison have significant limitations on their personal liberty. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 555, 94 S. Ct. 2963, 2974, 41 L. Ed. 2d 935 (1974) ("Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system.'") (quoting Price v. Johnston, 334 U.S. 266, 285, 68 S. Ct. 1049, 1060, 92 L. Ed. 1356 (1948)). Police and correctional officers are authorized by law to use force, sometimes lethal force, in order to enforce those limitations. Bradley, 141 Wn. App. at 737-38. Imprisoned or arrested persons simply do not have a right to refuse many intrusions into their privacy or liberty, and the risk of escalation of violence if they do so is enormous. Id. The same is not true of persons receiving unwanted medical treatment.

But the Court of Appeals opinion appears to extend this principle to medical professionals such as the EMTs and firefighter in this case. Slip op. at 5, 7. No Washington court has previously so held, and this question is one of substantial public interest. This Court should grant review under RAP 13.4(b)(4) and hold that the heightened standard for

self-defense against those charged with law enforcement does not extend to those charged with providing emergency medical care.

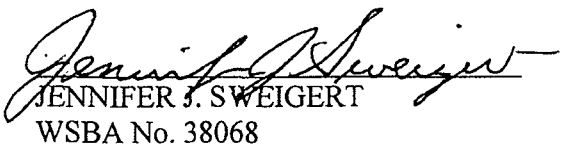
E. CONCLUSION

The Court of Appeals opinion conflicts with decisions of this Court and the Court of Appeals and presents significant questions of public interest. Jordan therefore requests this Court grant review under RAP 13.4 (b)(1), (2), and (4).

DATED this 29th day of July, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RAYMOND EDWARD JORDAN, aka RAYMOND D. JORDAN, Appellant.	)	NO. 72892-0-I DIVISION ONE UNPUBLISHED OPINION FILED: May 4, 2015

LEACH, J. — Raymond Edward Jordan appeals his conviction for five counts of third degree assault. He claims that the trial court prevented him from presenting his theory of the case by refusing to instruct the jury on self-defense. Because the record contains no evidence sufficient to entitle Jordan to a self-defense instruction, the trial court did not err when it failed to give this instruction. We affirm.

FACTS

On February 4, 2013, emergency medical technicians (EMTs) responded to a request for assistance. When they arrived at the Yakima public library, they found Raymond Jordan lying face down in a bathroom stall. They entered the stall and attempted to get a response from Jordan. When Jordan failed to respond, they rolled him onto his back. After one EMT administered a sternum rub, Jordan awoke to one of them supporting his head in a C-spine hold (cervical spine immobilization). Jordan looked at the EMT, sat up, and began swinging

and kicking. They restrained Jordan on the ground. One of the EMTs jumped with his knees onto Jordan's legs to prevent him from kicking and hit Jordan's sternum when Jordan attempted to punch the EMTs. Jordan cussed and told the EMTs to "f*** off" and "get the f*** off of me" when they questioned him.

Firefighters arrived and assisted the EMTs in restraining Jordan. One of the EMTs testified on cross-examination that Jordan's responses to his questions caused the EMT to believe Jordan needed treatment and substituted his own judgment for Jordan's. While the emergency personnel held Jordan down, an EMT injected him with a sedative, Versed, and expected him to pass out within 10 to 15 minutes. Jordan continued to swing, kick, and direct obscenities at those restraining him. He tried to bite one of the firefighters several times.

Yakima police began to arrive. The first to arrive placed Jordan in handcuffs, but when EMTs could not strap him to a backboard, they asked police to remove the handcuffs. Jordan remained combative. Both EMTs testified that they believed Jordan did not want to be placed on a backboard. As Jordan attempted to push toward the officers and firefighters restraining him, Officers Robert Grant and Mark Grow took over the restraint of Jordan's arms, and Officer Grant put a knee on Jordan's chest. Grant believed Jordan had been drinking based on the smell and vomit but did not know EMTs had administered a sedative. Jordan pinched and twisted Officer Grow's arm and tried to bite both

officers. Jordan took Officer Grant's radio, but Officer Grant retrieved it. Jordan then leaned forward with an open mouth as if to bite Officer Grant, but Officer Grant told him not to try to bite him and kneed Jordan in the chin. Jordan then attempted to bite Officer Grant again, and Officer Grant punched Jordan twice in the face. Officer Grant helped secure Jordan on the backboard. Jordan continued to push away for a few seconds, but the punches "took the fight out of him."

The State charged Jordan with five counts of third degree assault against two EMTs, one firefighter, and Officers Grant and Grow. At the close of trial, the court instructed the jury on voluntary intoxication's effect on one's ability to form intent, but it declined to give Jordan's proposed instruction on involuntary intoxication to the jury. It also declined to give an instruction on the lawful use of force in self-defense, stating,

> I agree with the State on this point. I think the right to refuse does not include the right to use physical force, at least the hitting, the biting and kicking, and it's obviously also a limited right to refuse. I think the EMT probably testified accurately that when a person's mental state is such that they have an obligation, a legal obligation, to substitute their own judgment for a person who isn't able to protect themselves with their decisions, so I agree with the State. The instruction will not be given.

The jury found Jordan guilty, and the court gave him a standard range sentence. Jordan appeals.

STANDARD OF REVIEW

Where a trial court declines to give a self-defense instruction, this court's standard of review depends on the reason the trial court gave for its ruling.[1] If the trial court declined the instruction because it found no evidence supported the defendant's subjective belief that he is about to be injured, we review for abuse of discretion.[2] But this court reviews de novo a trial court's determination as a matter of law that no reasonable person would have acted as the defendant did under the circumstances.[3] Because the trial court determined as a matter of law that no reasonable person may use physical force such as hitting, biting, and kicking when exercising a right to refuse medical treatment and failed to give the instruction for that reason, we review de novo. This court views the evidence in the light most favorable to the defendant.[4]

ANALYSIS

Jordan claims that the trial court denied him the opportunity to present his defense when it declined to give Jordan's proposed self-defense instruction. We disagree.

The trial court must instruct the jury on the defendant's case theory where evidence supports that theory, and the court's failure to do so constitutes

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[1] State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).
[2] Read, 147 Wn.2d at 243.
[3] Read, 147 Wn.2d at 243.
[4] State v. George, 161 Wn. App. 86, 95, 249 P.3d 202 (2011).

reversible error.[5] A defendant must produce some evidence demonstrating self-defense to be entitled to a self-defense instruction, and the burden then shifts to the prosecution to prove the absence of self-defense.[6] Ordinarily, a defendant proves self-defense by showing that he subjectively feared that he was about to be injured, that this belief was objectively reasonable, and that he exercised no greater force than was reasonably necessary.[7] When charged with assaulting a law enforcement officer, the defendant must fear more serious injury, "an imminent threat of serious physical harm."[8] "The evidence of self-defense must be assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees."[9] A jury need not find actual danger to establish self-defense but only that the defendant reasonably believed danger of imminent harm existed.[10]

We look to see if the record contains any evidence that Jordan subjectively believed he was in danger of imminent harm and if his belief was

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[5] State v. Harvill, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010) (quoting State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997)).

[6] State v. McCreven, 170 Wn. App. 444, 462-63, 284 P.3d 793 (2012) (quoting State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997)).

[7] RCW 9A.16.020(3); State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010); State v. L.B., 132 Wn. App. 948, 953, 135 P.3d 508 (2006).

[8] State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995).

[9] State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

[10] Riley, 137 Wn.2d at 909.

objectively reasonable.[11] Jordan argues that the record sufficiently shows that he subjectively feared imminent harm. Testimony at trial shows that Jordan gained consciousness in response to the EMTs rolling him over and administering a sternum rub. One of the EMTs supported his head in a C-spine hold and explained to Jordan who the EMT was and what was happening. Jordan responded by swinging and kicking. To justify the first alleged incident of assault, Jordan must identify some evidence showing that he had a subjective fear of harm before he acted and the objective reasonableness of this fear. Contrary to Jordan's claim, his swinging and kicking alone is not evidence of subjective fear—only unexplained aggression. By the time Jordan told the EMTs to "f*** off" and "get the f*** off of me," he had already assaulted the EMTs. Thus, the record contains no evidence showing that Jordan acted with subjective fear of imminent harm when he first assaulted the EMTs.

Because all the remaining assault charges resulted from Jordan's continued struggle against justified restraint after Jordan first assaulted the EMTs, no evidence shows that he ever acted in self-defense. Under RCW 70.96A.120(2), once a person has threatened, attempted, or inflicted physical harm on himself or others, a peace officer shall take that person into protective custody. And the officer may use reasonable force to protect himself or herself

[11] See State v. Walker, 136 Wn.2d 767, 773, 966 P.2d 883 (1998).

or to effect the custody.[12] Once Jordan assaulted the EMTs with no evidence of self-defense, the EMTs and firefighters had reason to use force to further protect themselves and to detain Jordan. And because the police would have arrested Jordan if emergency personnel had not taken him to the hospital, the record must include some evidence that Jordan feared actual, imminent, serious injury or death, the more stringent standard applied to a defendant charged with assaulting a law enforcement officer.[13] Jordan does not identify any evidence showing that he feared actual, imminent, serious injury or death as required to entitle him to a self-defense instruction for the remaining charges.

Where the record does not include any evidence of the subjective element of self-defense, we need not review the objective element.

CONCLUSION

Because the record shows no evidence of the subjective element of self-defense, the trial court did not err when it declined to give a self-defense instruction. We affirm.

Leach, J.

WE CONCUR:

Appelwick, J.

Cox, J.

[12] RCW 70.96A.120(2).
[13] See State v. Bradley, 141 Wn.2d 731, 737-38, 10 P.3d 358 (2000).

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State v. Raymond Jordan

No. 72892-0-I

Certificate of Service

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

That on the 5th day of November, 2014, I caused a true and correct copy of the **Petition for Review** to be served on the party / parties designated below by depositing said document in the United States mail.

Raymond Jordan
DOC No. 270012
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

Signed in Seattle, Washington this 5th day of November, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

July 29, 2015 - 3:17 PM

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