No. 456541

COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

TIMOTHY J. ROHN, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
Attorney for Timothy J. Rohn
PO Box 829
Graham, WA
509.939.3038

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INTRODUCTION

This case exemplifies the essence of a Catch-22: the intersection between competence, insanity and a criminal defendant's constitutional right to broadly control his own defense. Mr. Rohn was acquitted in 2005 as not guilty by reason of insanity. He spent the next eight years in the criminal forensic unit at Western State Hospital. His petitions for conditional release were denied. In 2013, while still hospitalized, he was charged with several felonies. The doctors at WSH evaluated him and found him found competent to stand trial. Deemed competent, he moved to represent himself at trial. Despite an extended and cordial colloquy, his motion was denied because the court believed the choice neither knowing nor intelligent. Mr. Rohn verbally asserted a plea of not guilty by reason of insanity, which was never entered. On the eve of trial, the court never inquired into Mr. Rohn's forgoing of the affirmative defense, which also required a knowing and intelligent waiver. Mr. Rohn respectfully asks this Court to reverse his convictions and remand for a new trial.

I. ASSIGNMENT OF ERRORS

A. The trial court erred when it denied Mr. Rohn his constitutional right to represent himself.

B. The trial court erred when it allowed Mr. Rohn to forgo an affirmative defense of not guilty by reason of insanity without first determining if it was an intelligent and voluntary decision.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Where a criminal defendant unequivocally states that he intends to proceed pro se, has been found competent by the trial court, and after an extended court colloquy is unwavering, is it error for the trial court to rule that although the defendant is competent to stand trial he may not represent himself because he is mentally ill, thus the decision to proceed pro se is not the product of a voluntary and intelligent choice?
2. Where a criminal defendant has been denied the right to represent himself at trial because he is mentally ill and incapable of exercising a voluntary and intelligent choice, is it error for the trial court to allow that defendant the option to forgo the affirmative defense of not guilty by reason of insanity, which requires a voluntary and intelligent decision?

II. STATEMENT OF FACTS

Timothy Rohn has a documented history of mental illness. He has been homeless much of his life and arrested between 15 and 20 times. (CP 32-48). In July 2005, he was arrested and convicted for two counts of

assault in the third degree. (CP 226-227). He was sentenced to a standard range of three to eight months in jail. (CP 227). In October 2005, charged with second-degree arson, he was acquitted by reason of insanity. (CP 185). Although he petitioned several times for release to a less restrictive environment, he spent the next eight years at Western State Hospital (WSH) in the criminal forensic unit. (10/2/13 RP 7; 11/6/13 RP 13).

While at WSH, he made verbal threats, threw gallons of ice water into the nurses' station, spit at a staff member, slapped a peer, aggressively damaged hospital property and on October 14, 2012, reportedly hit a staff member with a sock weighted with several "D" size batteries. (CP 37). Between February 21, 2013 and May 17, 2013, he was placed in seclusion 8 times and additionally, placed in restraints twice. (CP 37).

On July 3, 2013, Mr. Rohn appeared at what was to be his arraignment on the charge of felony harassment for events that occurred July 1, 2013, at WSH. (7/3/13 RP CP 1-2). The trial court deferred the arraignment and instead, ordered a competency evaluation. (7/3/13 RP 5; CP 6-10). The court order did not include a sanity evaluation. (CP 9).

Mr. Rohn was unresponsive during the forensic evaluation. (CP 33). The report, filed with the court on July 19, 2013, was based on information and an interview compiled and dated May 31, 2013. (CP 34).

The report detailed numerous hospitalizations for mental health issues beginning in 1991. (CP 32-48). Mr. Rohn had a history of diagnosis with and treatment for Bipolar I disorder, as well as a secondary Axis I diagnosis of malingering and an Axis 2 diagnosis of personality disorder not otherwise specified. (CP 46-47). The evaluator concluded that Mr. Rohn possessed a factual and rational understanding of the charges and court proceedings he faced and likely had the capacity to assist in his own defense, but added a caveat:

> "Given the current clinical and historical assessment, should Mr. Rohn's forensic status change, due to a history of aggressivity (sic), current NGRI status, the severe nature of the current charges, and a history of mood disorder with psychosis, Mr. Rohn did give indication of a current need for an evaluation by a DMHP for civil commitment under RCW 71.05." (CP 48).

The trial court entered an order of competency on August 15, 2013. (CP 53-54).

Two weeks later, at the next hearing, Mr. Rohn objected to a continuance of his trial date and informed the court he wished to continue pro se. (9/9/13 RP 6-7). Despite Mr. Rohn's assertion that he had familiarity with filing motions, and conducting his own legal research, Judge Chushcoff directed him to consult with counsel and submit a motion to be heard at a later date. (RP 7).

Judge Murphy heard Mr. Rohn's motion to proceed pro se on September 23, 2013. (9/23/13 RP 3; CP 57). The court conducted an extended colloquy, as follows:

> The Defendant: I ask you literally to scrutinize my motion to proceed pro se.
> The Court: Why do you want to represent yourself?
> The Defendant: I feel my interest would be best served by defending myself your Honor. The reason for that is that I believe I have the most to gain by winning this case and would put the most time and effort into it.
> The Court: Have you ever studied law?
> The Defendant: No, your Honor, I have not.
> The Court: Have you represented yourself or any other defendant in any kind of a criminal action?
> The Defendant: Not a criminal action, no.
> The Court: You realize that you are charged with the crime of felony harassment?
> The Defendant: Yes, sir.
> The Court: What is the standard sentencing range on that?
> Mr. Lane [Prosecutor]: I think we determined at a minimum about four to 12 months n jail, depending on what the offender score calculation is.
> The Court: It is a Class C?
> Mr. Lane: That is correct.
> The Court: You understand that you are facing a standard sentence range of four to 12 months in jail, there is a maximum penalty of five years in prison and a $10,000 fine if you are convicted of this charge. Do you understand that?
> The Defendant: Yes, your Honor.

(9/23/13 RP 3-4).

After learning the State intended to file additional charges in the matter, the following colloquy occurred:

> The Court: You understand, Mr. Rohn, from what the Court has just been told your standard sentencing range could

increase significantly, you could be looking at standard sentencing ranges that are lengthy prison sentences, also the maximum penalty could be as much as – are we talking about Class A, Class B?

Mr. Lane: Class A.

The Court: Could be life in prison and a $50,000 fine. Do you understand that?

The Defendant: Yes, sir.

The Court: You also understand if you represent yourself, you are on your own. The Court can't tell you how you should try your case or even advise you as to how to try the case.

The Defendant: Your Honor, I have a legal liaison. She was a legal secretary by profession. She acts as my….paralegal. She files all my motions for me. I understand I will be on my own.

The Court: This person cannot come to court and represent you, sit at counsel table with you. Do you understand that?

The Defendant: Yes, I understand that.

The Court: Are you familiar with the Rules of Evidence?

The Defendant: No, your Honor. I will be.

The Court: What is your educational background?

The Defendant: I believe I have a GED, your Honor.

The Court: You believe you have one?

The Defendant: Yes, sir.

The Court: Does that mean you do have one?

The Defendant: Yes, sir.

The Court: You understand the Rules of Evidence govern what evidence may or may not be introduced at trial. In representing yourself, you must abide by those rules. Do you understand that?

The Defendant: Yes, your Honor.

The Court: Are you familiar at all with the Rules of Criminal Procedure?

The Defendant: Yes.

The Court: You are?

The Defendant: Yes.

The Court: How are you familiar with them?

The Defendant: I have been to court a few times before for various charges.

The Court: Do you understand that the rules of criminal procedure govern the way in which a criminal action is tried in court?

The Defendant: Yes, your Honor.

The Court: Do you understand that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story?

The Defendant: Yes.

The Court: You must proceed question by question through your testimony. Do you understand that?

The Defendant: Yes, sir.

The Court: Have any threats or promises been made to get you to waive your right to counsel?

The Defendant: No your Honor.

The Court: Again, why is it that you want to represent yourself?

The Defendant: I believe my interest would be best served by representing myself. I believe that I will have the motivation to put the time and effort and energy into it. I believe I am competent to do this. I have a paralegal and a legal secretary at my disposal, and my whole trial, everything I am bringing, is just a closing argument, your Honor. Just a closing argument.

The Court: You are not going to call any witnesses or cross-examine any witnesses?

The Defendant: I am just going to speak to the evidence that is presented, the closing argument, leave my case to the jury.

The Court: Do what?

The Defendant: Leave my case to the jury.

The Court: You understand that closing argument is the time to summarize the evidence that has been presented. It is not a time to testify. You cannot get up there and tell your story in closing argument.

The Defendant: Yes, I understand that. I am going to speak to the evidence as presented. Leave it up to the jury.

The Court: I must advise you, in my opinion you would be far better off being represented by a trained lawyer than you can be representing yourself, even if you have a paralegal and a legal secretary that you think is at your disposal. I think it is unwise of you to try to represent

yourself. You are not familiar with the law. You are not familiar with court procedure. You may have been to court a few times. The trial is a whole different situation. You are not familiar with the Rules of Evidence. I would strongly urge you not to try to represent yourself. You went to Western State Hospital. There was recently an order of competency that was entered.

(9/23/13 RP 4-8).

The Court: Mr. Rohn, I think you are making a huge mistake by asking the Court to have you represent yourself. You have gone to Western State Hospital. You were at Western State Hospital on a not guilty by reason of insanity…..

You didn't participate in the competency evaluation, it appears, by your own choice. What you have represented to me in court is your intention at trial is to not present any evidence or cross-examine or participate until closing argument, at which time you are going to speak to the evidence to the jury. A defendant does have a constitutional right to represent himself, if you choose to do so. The Court has to make a finding it is knowing and voluntary. I have some grave concerns about whether Mr. Rohn completely understands what it is he is doing at this point in time asking to represent himself. A decision on competency is a low threshold for that; understanding the nature of the charges and being able to assist your attorney. There has been a finding by Western State Hospital…that Mr. Rohn is competent to stand trial. I do think there becomes a greater level to say that he would be in the best position to be able to represent himself.

I am going to deny the motion for him to represent himself. I don't think he would meet the standard to be able to do that. I am doing that with an understanding that he has a right to do that, a constitutional right. I think given the nature of the mental health issues that are here, what he has told the Court about his

> intentions…I am going to deny the motion for him to represent himself.
>
> (9/23/13 RP 9-11).

The following week, again before Judge Chushcoff, Mr. Rohn informed the court that he intended to use an insanity defense. The court noted it on the omnibus order. (10/2/13 RP 10;12). On October 28, 2013, Mr. Rohn filed a "declaration of expatriation" renouncing his American citizenship. (CP 63).

The prosecutor and defense counsel again raised concerns about Mr. Rohn's competency on November 6, 2013, before Judge Costello. Mr. Rohn had penned and sent a self-styled "encrypted" letter to the State's attorney two days previous to the hearing. (11/6/2013 RP 8). When the court questioned Mr. Rohn about the letter, he said that he was neither incompetent nor insane, but rather, an exceptionally intelligent psychopath, with "antisocial tendencies', "very gifted at deception" and "very gifted at malingering." (11/6/2013 RP 19).

He further reported that he had not participated in his competency evaluation because he did not want to be found incompetent or insane. He stated he believed he had manipulated the system to obtain a not guilty by reason of insanity judgment in 2005. He reiterated that he was capable of representing himself. (11/6/13 RP 19-22). The court determined that he remained competent to stand trial. (11/6/13 RP 28). The court did not

make further inquiry into the reference to self-representation or his statement that he was not mentally ill.

At the same hearing, the State objected to any mental health defense evidence being presented to the jury. (11/6/2013 RP 40). Defense counsel did not object, citing Mr. Rohn's earlier declaration that he did not believe himself to be mentally ill. (11/6/2013 RP 41). The court stated it was not making any conclusion as to whether Mr. Rohn was or was not mentally ill, and although he had been previously diagnosed with a mental illness, such information was irrelevant to the jury. (11/6/2013 RP 43).

The court made extensive inquiry into Mr. Rohn's proposed defense of self-defense. (11/6/13 RP 77, 78,120; 11/13/13 RP 121-123, 128-129, 133). The court did not give a self-defense instruction.

The matter proceeded to a jury trial after which he was convicted of first degree arson, two counts of first-degree malicious mischief, one count of felony harassment, one count of intimidating a public servant, and one count of theft in the third degree. (CP 197-210). He makes this timely appeal. (CP 249).

III. ARGUMENT

A. The Trial Court Erred When It Denied Mr. Rohn His Constitutional Right To Represent Himself.

1. Standard of Review

A request for pro se status is a waiver of a constitutional right to counsel, and denial is reviewed under an abuse of discretion standard. *In re Personal Restraint of Rhome,* 172 Wn.2d 654, 668, 260 P.3d 874 (2011). Discretion is abused if it is manifestly unreasonable, rests on facts unsupported by the record, or was reached by applying an incorrect legal standard. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

2. Mr. Rohn Had A Constitutional Right To Represent Himself.

The Sixth Amendment to the United States Constitution grants a criminal defendant the right to represent himself at trial. *Faretta v. California,* 422 U.S. 806, 816, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Article 1, §22 of Washington State Constitution provides, in relevant part, "in criminal prosecutions the accused shall have the right to appear and *defend in person, or by counsel*..." unequivocally guaranteeing an accused the constitutional right to represent himself. (Emphasis added). *State v. Kolocotronis,* 73 Wn.2d 92, 97, 436 P.2d 774 (1968); *State v. Silva,* 107 Wn.App. 605, 618, 27 P.3d 663 (2001).

While courts should engage in a presumption against the waiver of counsel, improper rejection of the right to self-representation requires reversal. *State v. Madsen,* 168 Wn.2d 496, 503-04, 229 P.3d 714 (2010). The grounds that allow a court to deny a defendant the right to self-

representation are limited to a finding that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. The finding must be based on some identifiable fact. *Id.* at 504-05). The relevant question in deciding whether to grant a motion for self-representation is not the defendant's skill or ability, but rather, the validity of his waiver. *Godinez v. Moran,* 509 U.S. 389, 400, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). To exercise a constitutional right to self-representation, the accused must knowingly, intelligently and voluntarily waive his right to counsel. *Johnson v. Zerbst,* 304 U.S. 458, 464-65, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *City of Bellevue v. Acrey,* 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984); *State v. Coley,* 326 P.3d 702, 711 (2014)(internal citations omitted).

The court must engage in a colloquy with the defendant to ensure his understanding of the nature of the charge against him, the potential maximum penalty, and the requirement that he comply with the legal procedures and evidence rules. *Acrey,* 103 Wn.2d at 211. In essence, the defendant must exercise the right to waive counsel with "eyes open" to the dangers and disadvantages of the decision. *State v. Hahn,* 106 Wn.2d 885, 726 P.2d 25 (1986).

Here, the court had already found Mr. Rohn competent to stand trial. The Washington Supreme Court has consistently held the

competency standard for waiving the right to counsel is the same as the competency standard for standing trial. *Hahn,* 106 Wn.2d at 893; *In re Personal Restraint of Fleming,* 142 Wn.2d 853, 862, 16 P.3d 610 (2001).

Mr. Rohn made a motion to proceed pro se approximately six weeks before trial, and did not request a continuance. His motion was timely and not made for the purpose of delay. Mr. Rohn clearly and unequivocally told the trial judge that he wanted to represent himself at trial. The court conducted an extended colloquy with Mr. Rohn, questioning him about his understanding of the charges, the potential maximum penalties, and the requirement that he comply with court rules of evidence and criminal procedure. *Acrey* 103 Wn.2d at 211. His responses reflected a clear understanding of the nature of the charges, the possible penalties, and the court's requirement that he comply with court rules. Where a defendant is accurately advised on the maximum possible penalty, the waiver may be considered an intelligent waiver. *State v. Silva,* 108 Wn.App. 536, 539, 31 P.3d 729 (2001). Further, Mr. Rohn assured the court that he was not threatened or coerced in any manner regarding his motion to represent himself, thus, his waiver of the assistance of counsel was voluntary.

After noting that Mr. Rohn had been found competent, the sole reason the court denied his request was:

> I do think there becomes a greater level to say that he would be in the best position to be able to represent himself.
>
> I am going to deny the motion for him to represent himself. I don't think he would meet the standard to be able to do that. I am doing that with an understanding that he has a right to do that, a constitutional right. I think given the nature of the mental health issues that are here, what he has told the Court about his intentions…I am going to deny the motion for him to represent himself.
>
> (9/23/13 RP 9-11).

Simply put, the court reasoned that Mr. Rohn was competent to stand trial, but took issue with the trial strategy that he intended to use. The right to self-representation is afforded a defendant despite the fact that "exercising the right will almost surely result in detriment to both the defendant and the administration of justice." *State v. Vermillion,* 112 Wn.App. 844, 851, 51 P.3d 188 (2002)(internal citations omitted). A defendant's "skill and judgment" is not a basis for rejecting a request for self-representation. *Hahn*, 106 Wn.2d at 890 n.2. Because the trial court's ruling denying the request was based on the untenable ground that he lacked the necessary skill and judgment to secure himself a fair trial, the remedy is reversal and remand for a new trial. *Vermillion*, 112 Wn.App. at 858.

The court was unclear to what extent Mr. Rohn's mental health issues were factors in its decision. In *Rhome,* the Court held that neither

federal nor state due process principles require that a trial court make an independent determination of a mentally ill defendant's waiver of the assistance of counsel after the defendant has been found competent to stand trial. *In re Rhome,* 172 Wn.2d 654, 260 P.3d 874 (2011). The Court noted that existing law did not require a court to apply a different standard beyond securing a knowing and intelligent waiver from a mentally ill defendant seeking to waive counsel and proceed pro se. *Id.* at 666. There is no heightened standard for waiver of counsel and pro se representation when there are mental health issues present. *Id.*; *Hahn,* 106 Wn.2d at 895.

Here, to the extent the court addressed the mental health issues, in contradiction to *Hahn,* the court used a "competency plus" standard. The court stated,

> I do think there becomes a greater level to say that he would be in the best position to be able to represent himself.
> I am going to deny the motion for him to represent himself. I don't think he would meet the standard to be able to do that.

The trial court's ruling was based on an untenable ground. The remedy is reversal and remand for a new trial. *Vermillion,* 112 Wn.App. 858.

B. The Trial Court Erred When It Allowed Mr. Rohn To Forgo The Defense Of Not Guilty By Reason Of Insanity Without First Determining If It Was An Intelligent And Voluntary Decision.

Washington follows the M'Naghten rule for determining insanity. Establishing the defense of insanity by a preponderance of the evidence, requires a showing that (1) at the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that: (a) he was unable to perceive the nature and quality of the act with which he is charged; or (b) he was unable to tell right from wrong with reference to the particular act charged. RCW 9A.12.010.

Under Washington case law, it is presumed that the mental condition of a person acquitted by reason of insanity continues and the burden rests with that individual to prove otherwise. *State v. Klein,* 156 Wn.2d 103, 114, 124 P.3d 644 (2005). (Internal citations omitted). An insanity acquitee may be held in the mental institution so long as he is *both* mentally ill *and* dangerous as a result of that mental illness. *State v. Reid,* 144 Wn.2d 621, 631, 30 P.3d 465 (2001)(Emphasis added).

Mr. Rohn had been institutionalized for eight years as the result of an acquittal by reason of insanity. The finding of not guilty by reason of insanity justifies commitment because the defendant's insanity at the time of the crime is presumed to continue *after* the verdict. *Jones v. United States*, 463 U.S. 354, 370, 103 S.Ct. 3043, 77 L.Ed.2d 94 (1983); *Foucha v. Louisiana,* 504 U.S. 71, 77, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992).

Here, there is more than a presumption that the insanity continued, as over the course of the eight years Mr. Rohn was committed to WSH he was denied release. If he had not been both mentally ill and a danger to others, he would have been granted his requested conditional release. *Reid,* 144 Wn.2d 631.

Under CrR 4.2(c) in addition to the verbal entry of a plea of not guilty by reason of insanity, a written notice of an intent to rely on the insanity defense must be filed at the time of arraignment or within 10 days thereafter, or at such time as the court may for good cause permit. RCW 10.77.030(1). Mr. Rohn told the court that his original plea, entered at arraignment was not guilty by reason of insanity. Despite his attorney's assurance that it was not the case, Mr. Rohn was very concerned because he believed that plea was changed to 'not guilty' without his permission. (10/2/13 RP 4-5).

In contradiction to CrR 4.2, both the court and defense counsel agreed that a defendant would not make a not guilty by reason of insanity plea at arraignment. (10/2/13 RP 7). Nevertheless, Mr. Rohn verbally informed and affirmed to the court on October 2, 2013, that he intended to go forward with an insanity defense. (10/2/13 RP 10;12). The court duly noted the defense was investigating an insanity defense on the omnibus order, but did not enter a formal plea. (10/2/13 RP 11).

One month later, despite his eight-year commitment, and diagnosed mental illness, Mr. Rohn told the court he did not believe he had a mental illness and felt he should be held responsible for his actions. The court conducted no further questioning about his potential affirmative defense.

When a criminal defendant pleads guilty, thus waiving all possible defenses, to ensure due process, the court is required to determine that such a plea is knowing, voluntary and intelligent. *In re Hews,* 108 Wn.2d 579, 590, 741 P.2d 983 (1987)(*Hews* II). Similarly, when a defendant seeks to waive his insanity defense, it is permissible to inquire whether he is competent to stand trial and whether his decision is intelligent and voluntary. *State v. Jones,* 99 Wn.2d 735, 738, 746, 664 P.2d 1216 (1983); *State v. Coristine,* 177 Wn.2d 370, 377, 300 P.3d 400 (2013). To determine whether a decision is intelligent and voluntary, the trial judge may:

> …conduct an inquiry designed to assure that the defendant has been fully informed of the alternatives available, comprehends the consequences of failing to assert the [insanity] defense, and freely chooses to raise or waive the defense." *Jones,* 99 Wn.2d at 745.

Mr. Rohn had a Sixth Amendment right to mount the defense of his choosing. *McKaskle v. Wiggins,* 465 U.S. 168, 177-78, 104 S.Ct. 944,

79 L.Ed.2d 1122 (1984). Mr. Rohn initially told the court (October 2, 2013) that he wanted to avail himself of the not guilty by reason of insanity defense. On November 6 and November 13, Mr. Rohn's attorney asserted a self defense theory. The court made extensive inquiry into the application of that defense to the charges and ultimately did not give a self-defense instruction to the jury.

The court had serious misgivings about Mr. Rohn's ability to knowingly and intelligently exercise his right to represent himself, concluding he did not. The court also concluded that his affirmative defense of self-defense was inapplicable to the charges. However, the court never made inquiry into the most reasonable and logical defense, not guilty by reason of insanity. Standards of due process required the court to inquire into whether the decision to waive the insanity defense was freely and intelligently made.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Rohn respectfully asks this Court to reverse his convictions and remand for a new trial.

Dated this 4th day of Augusts 2014.

Respectfully submitted,

s/Marie Trombley, WSBA 41410
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comast.net

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on August 4, 2014, I served by USPS, first class, postage prepaid a true and correct copy of the Brief of Appellant to:
Timothy Rohn 884653
Washington Corrections Center
PO Box 900
Shelton, WA 98584

And by email, per prior agreement between the parties to:
EMAIL: PCpatcecf@co.pierce.wa.us
Kathleen Proctor
Pierce County Prosecutor's Office
930 Tacoma Ave S
Tacoma, WA

Marie Trombley
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comcast.net

TROMBLEY LAW OFFICE

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