COA No. 46425-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

SOY OEUNG,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Thomas J. Felnagle

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# REPLY BRIEF

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## A. REPLY ARGUMENT

### 1.THE STATE'S PETRICH RESPONSE RELIES ON THE ERRONEOUS ASSERTION THAT DEFENDANTS DO NOT HAVE A RIGHT TO UNANIMOUS JURY FINDINGS OF PROOF ON EVERY ESSENTIAL ELEMENT OF THE CRIME CHARGED, OR ON FIREARM ENHANCEMENTS.

Petrich[1] requires reversal of all of Soy Oeung's convictions for the charged offenses that contain deadly weapon (firearm) elements, and for the same reasons requires reversal of the firearm enhancements. In trial, the State presented evidence of three different allegedly operable "guns," and in closing the prosecutor *expressly* argued to the 12 jurors that they could pick from among whichever of the three guns it believed the State had proved to be a firearm, with no requirement of jury unanimity whatsoever. AOB, at pp. 20-36.

On appeal, the Respondent appears to be asserting that criminal defendants do not possess the right to unanimous jury findings of proof beyond a reasonable doubt on all the essential elements of the crime charged, but rather only on a single element, which the State contends represents the basic "act" of the crime charged. Respondent also contends that no requirement of jury

[1] State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984).

unanimity applies to firearm enhancements. SRB, at pp. 140-42. The Respondent is in error – our Supreme Court has held that Wash. Const. art. 1, § 22 requires that juries unanimously find proof beyond a reasonable doubt as to every essential element for conviction, and on all special allegations such as firearm enhancements.

**a. The State's claim appears to be that unanimity is required on less than all the elements of the offense, and is required not at all on firearm allegations.** This contention fails, as it is contrary to both the letter of the Petrich doctrine, and its constitutional undergirding. Appellant, Ms. Oeung, has assigned unanimity error as to the firearm elements of burglary, robbery, assault, and theft of a firearm. Appellant has also identified unanimity error as to the multiple firearm enhancements.[2]

[2] The act of stealing a firearm requires proof of theft of a statutory firearm, and all the firearm enhancements required proof the act of being armed with a deadly weapon, advanced as a firearm. As also noted in the briefing, the burglary and robbery charges were elevated to the first degree by the act of being armed with a deadly weapon, a firearm. RCW 9.41.010(1) is at issue in each instance; for brevity's sake, these elements of proof and the special allegations are referred to herein as requiring proof of a firearm.

***(i). This Court should reject the State's first contention -- that the Petrich unanimity requirement for proof beyond a reasonable doubt applies only to some "act" element that represents the core of the crime, and not to any other elements of the crime.***

It is generally agreed that the State in a criminal case must prove every essential element of the crime beyond a reasonable doubt. In Washington, the requirement of unanimity is an aspect of this Due Process guarantee.[3]

When the State argues that Petrich cases describe this doctrine as applicable in "multiple acts" cases, the State seems to contend that this means that unanimity is only concerned with that element of a crime that can be viewed as the 'core' act of conduct of the offense. SRB, at pp. 138-39.

The Respondent does not use the term "core," or "peripheral," but the argument seems to be that there are peripheral elements of crimes that are not subject to unanimity. Thus, the State argues, in an armed robbery case, the jurors must all agree on the particular act that equals the core conduct of "robbery," but

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[3] As argued, the Petrich rule of jury unanimity, from Wash. Const. art. 1, § 22, is an aspect of this requirement, because the burden of proof beyond a reasonable doubt on the elements is not achieved in a criminal jury trial except where all jurors agree – rather than, say, a majority. AOB, at pp. 23-24 (citing State v. Petrich, supra, 101 Wn.2d 566, 570, 683 P.2d 173 (1984), and State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911) ("[W]here the evidence tends to show two separate commissions of the crime, unless there is an election it would be impossible to know that either offense was proved to the satisfaction of all of the jurors beyond a reasonable doubt)).

some of the 12 jurors could pick firearm "A" as the element that elevates the robbery to armed robbery, another subset of jurors could choose firearm B as the basis, and yet another cadre could rest their finding on firearm C -- and none of this poses any unanimity problem whatsoever.

The State uses as an example the case of State v. Coleman, 159 Wn.2d 509, 511, 150 P.2d 1126 (2007), wherein our Supreme Court applied the standard rule that in cases where is evidence of multiple "acts" the State must elect which of those "acts" the jury should rely on to convict, or the court must instruct the jurors that they must all agree on one specific of those criminal "act[s]." SRB, at pp. 138-39 (quoting Coleman).

In the Coleman case, a single count of molestation was at issue for this question, there was testimonial evidence that the defendant molested the victim on a certain date, and there was also testimony that he molested the victim in another instance, while they were watching the movie "Snow Dogs." The State did not elect, the jury was not instructed to agree, and as a result this was straightforward Petrich unanimity error, raisable – as always[4] – for

[4] See also State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998) (unanimity instruction required, whether requested or not, when jury could

the first time on appeal under RAP 2.5(a)(3). State v. Coleman, 159 Wn.2d at 511-12.

From this correct description of Coleman, the State goes on to suggest that the Petrich unanimity requirement only applies where there are multiple possible instances reliable-upon to prove the "act" that is the *core element* of the crime. Therefore, the State reasons, unanimity error does not occur where the element that was supported by multiple alternative proofs is some other, non-core, peripheral element – such as the element that the crime was committed while armed with a firearm, elevating it to the first degree. See SRB, at pp. 138-42.

However, the conduct that the Legislature has made culpable in cases involving firearm elements are "acts," in their totality. Armed robbery is an act. Additionally, for purposes of enhancements, the arming of oneself for or in a robbery, etc., is an "act" – whether it be described as the act of being armed, or the act of arming oneself, etc.

Without unanimity on all the elements, the charge is not proved. The case of State v. Brooks demonstrates this. In Brooks, 77 Wn. App. 516, 892 P.2d 1099 (1995), a prosecution for burglary

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find from the evidence that defendant committed a single charged offense on two or more distinct occasions).

of a building, no unanimity instruction was given and the State never elected which of two alleged buildings it was relying on to convict -- the entry of a storage shed during which a gas fixture was stolen, or the entry of a pump house with similar intent to steal. State v. Brooks, 77 Wn. App. at 520. Petrich error therefore occurred, and reversal was required under the standard of State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988), because the trial allegation as to one of the multiple acts was controverted – there was testimony that one "Dave" burglarized the storage shed. State v. Brooks, 77 Wn. App. at 521.[5]

In a Brooks sort of burglary case, the State's argument would apparently be that the jury need only unanimously agree on the core, conduct element of building "entry" – while in contrast, the minor question of proving what building was entered would be classed as merely peripheral, and conviction, the prosecution would protest, does not require unanimity of agreement as to the specific

[5] The Brooks Court of Appeals reversed the burglary count. Where the State's case presents the jury with multiple possible factual bases for the element at issue, but the jury is not told to be unanimous, reversal is required unless the Court can say that no rational juror could have entertained a reasonable doubt as to either of the bases proffered. State v. Brooks, 77 Wn. App. at 521. In the case, there was some testimony that one of the two possible buildings -- the "storage shed" -- was not burglarized by Brooks. Brooks, 77 Wn. App. at 521-22. Under Kitchen, such testimony amounts to controversion of the prosecution's claim on one of the bases proffered, thus mandating reversal. Brooks, at 521-22.

building entered. That proposition is incompatible with the Brooks analysis and inconsistent with the fundamental requirement of unanimous proof on each – and every -- essential element. See also State v. King, 75 Wn. App. 899, 903-04, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1994) (unanimity error required reversal where evidence showed multiple possible acts of cocaine possession but evidence was controverted as to one of the bases, where there was testimony that the police planted that bundle). King illustrates that possession of cocaine is not, as the State would argue, dissectible into some 'core' crime of possession (an element requiring unanimity) compared to an element of cocaine that merely refines the core offense with a peripheral element of "cocaine" as to which the jury need not be unanimous in finding proof beyond a reasonable doubt.

***(ii). This Court should reject the State's contention that Petrich is inapplicable because the elevated merely require that the actor be armed with "a" firearm in commission, or steal "a" firearm, or for the enhancements, was armed with "a" firearm.***

The State argues that unanimity is not required as to the particular facts chosen to support the firearm element of a crime (or a firearm enhancement), because these statutes' language uses

the preposition "a" when they say, and only say, "a" firearm (a "deadly weapon.") SRB, at pp. 141.

The Respondent quotes these "a" prepositions from the applicable criminal statutes, or from the instructions in the case of theft of a firearm. SRB, at pp. 141-42; see RCW 9A.56.300 (a). From this language, the State argues, neither the criminal offenses elevated in degree by firearms, the offense of stealing a firearm, or the firearm enhancements require unanimous agreement as to what specific firearm supports the verdict. SRB, at pp. 141-43,

This argument has some initial appeal, as would any argument that announces reliance on the 'plain language' of a statute, until one notes the criminal statutes that are phrased similarly. To be guilty of robbery, one must commit forcible taking from the person of "another," RCW 9A.56.190, but the State would argue that the jury does not have to agree on which particular person was the victim. A defendant is guilty of residential burglary if he enters or remains unlawfully in "a" dwelling, or second degree burglary if he enters "a" building, or first degree burglary if he enters "a" building and is armed with "a" deadly weapon. RCW 9A.52.025, .030, .020. None of this language has any consequences for unanimity doctrine. It cannot be argued that the

jury needn't unanimously agree on some specific person who was robbed – rather, this is the essential element of the victim.

And it cannot be argued that the jury need not unanimously agree on the particular building that was burglarized – see Brooks, supra – or on a particular deadly weapon, if there is more than one possible. If the jury hears evidence that the defendant was armed with an uncontrovertibly operable pistol, and hears other evidence that the defendant's arm was a rifle that some witness indicates is not operable, it matters *immensely* that the jury agree unanimously on a particular gun. If the jury is properly told to do so, by election or instruction, then the conviction can be tested for sufficiency of the evidence. But, if the jury is not told to be unanimous on the elements, then 3 jurors may well have relied on the inoperable "firearm," and only 9 jurors agreed on the operable firearm, and there is no sufficiency-assessable, valid conviction by proof of the essential elements to the jury beyond a reasonable doubt.

Importantly, operability is equally the core of the criminal "act" of armed robbery -- the operability and thus the danger and wrongfulness of being armed with firearm is at least as much the gravamen of the crime when charged in the first degree, as the entry itself. The only fix for the unanimity problem is the Petrich

harmlessness test – if the evidence of operability is uncontroverted as to both (or here, all three) guns – i.e., if no juror could possibly do *anything other than* find the element proved beyond a reasonable doubt -- then the lack of express assurances of unanimity will be tolerated. State v. Kitchen, supra.

**b. Reversal.** Harmlessness is impossible in this case. Given the testimony and particularly the State's closing argument in the case, it is impossible for the Respondent to satisfy its burden to prove the Petrich error harmless, absent a change in the existing law. The law of reversal in this regard *was changed* to become what it is now, as illustrated by the oft-cited pairing of citations to Petrich and State v. Kitchen which clarifies that sufficiency of the evidence is not enough to avoid reversal. See, e.g., SRB, at p. 138 (citing "State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).").

Specifically, controversion mandates reversal. The State v. Coleman case, described in the Opening Brief, is an example of the correct standard. If there is controversion – i.e., if there is a basis in the evidence that a jury could use to find "operability" not proved, the Petrich presumption of harmfulness is unrebuttable.

Although the Respondent gives lip service to the rule that mere "sufficiency" is never a cure for Petrich error, it then writes that the jury "could" conclude that all three of the devices at issue satisfied the firearm definition. SRB, at p. 142. The correct legal standard is different – affirmance is possible in the face of Petrich error only where no rational jury could do anything other than find the firearm definition proved as to each of the three devices. Straightforward application the Petrich rule requires reversal of the felonies and enhancements as argued in the Assignments of Error.

**2. THE CONVICTIONS FOR COMPLICITY TO ROBBERY, ASSAULT, UNLAWFUL IMPRISONMENT, AND THEFT OF A FIREARM, AND THE FIREARM ENHANCEMENTS, MUST BE REVERSED AND DISMISSED FOR INSUFFICIENCY OF THE EVIDENCE.**

Respondent concedes that accomplice liability requires knowing assistance in the commission of "the" crime but the evidence fails to show knowledge. Under State v. Roberts, 142 Wn.2d 471, 510–11, 14 P.3d 713 (2000), and State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000), Soy Oeung could not be convicted as an accomplice to first degree robbery, second degree assault, unlawful imprisonment, or theft of a firearm. See RCW 9A.08.020(3)(a)(i)(ii).

Here, there is no evidence that Ms. Oeung gave assistance to a perpetrator(s) knowing of any other crimes beyond burglary of the Ainsworth Street home to take property, thus cannot be found guilty of knowing assistance to robbery, assault, unlawful imprisonment, or theft of a firearm.[6]

Respondent argues that because Ms. Oeung encountered one individual, Mr. Fernandez, when she knocked on the door of the Ainsworth Street home, and because the home was large -- having three floors -- that the evidence was sufficient to show she was a knowing accomplice that the burglary would also involve the presence of "at least" one person inside the home. SRB, at p. 103.

However, one person is not two people, and for that reason alone, there was no knowing complicity to the second counts of robbery, assault, and unlawful imprisonment inside the home that were ultimately committed by the burglars, as to Mrs. Fernandez.

Further, Ms. Oeung was not knowingly complicit to the robbery, assault, or unlawful imprisonment of Mr. Fernandez. It is not reasonable to infer that she knew these crimes would be

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[6] This Court has previously granted Ms. Oeung's 3/6/15 motion to join in the arguments of co-appellant Azias Ross, see order of 3/13/15, but Mrs. Oeung emphasizes in particular, with regard to theft of a firearm, Mr. Ross's arguments in his Reply Brief at pp. 9-13.

committed simply because she knew the burglars were going to "take stuff." SRB, at p. 104.

Respondent argues that Ms. Oeung knew that a perpetrator entered the home with a firearm, and therefore, did know that the perpetrators would be committing robbery, assault, and unlawful imprisonment therein. SRB, at p. 104. First, Ms. Oeung has argued there is insufficient evidence that she knew a perpetrator was armed with a firearm, AOB, at pp. 41, 44-45, 51-52. The State's citation to facts showing that perpetrator Ross possessed firearms in the home that he and Ms. Oeung shared with friends and family does not show knowledge that a perpetrator entered the Ainsworth St. home with a firearm; the State refers to no evidence in the record that a perpetrator showed her or talked to her about a firearm during the time before, or during, the burglary. SRB, at pp. 106-109.[7] Second, the presence of a person in the home, even if, *arguendo*, she did know a perpetrator was armed, does now show knowledge that a taking was to be accomplished in the home by anything more than a taking by theft, rather than robbery, much less that assaults and unlawful imprisonments were to be

[7] These arguments also apply to Ms. Oeung's related argument that she did not have the knowledge required for imposition of firearm *enhancements*. AOB, at pp. 50-53.

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committed. State v. Roberts, 142 Wn.2d at 513 ("knowledge by the accomplice that the principal intends to commit 'a crime' does not impose strict liability for any and all offenses that follow"). Even if there was knowing assistance in a planned obtaining of property by theft does not equate to complicity to robbery. State v. Grendhahl, 110 Wn. App. 905, 910-11, 43 P.3d 76 (2002), much less knowing assistance in the assaults, and unlawful imprisonments that the perpetrators committed. The lack of knowledge as to the firearm also defeats the required showing of sufficiency as to the attached enhancements. AOB, at pp. 50-53; State v. Hayes, ___ Wn.2d ___ (Wash. Supreme Court, No. 89742-5, Feb. 5, 2015) (2015 WL 481023) (liability for an aggravator requires knowledge).

### 3. THE PETRICH UNANIMITY RULE REQUIRES REVERSAL OF THE CONVICTIONS FOR CONSPIRACY AND ATTACHED ENHANCEMENTS.[8]

Ms. Oeung argued that the prosecutor's argument in closing placed *multiple* possible 'agreements' and 'agreements by conduct' before the jury. AOB, at pp. 42-44. The State first argued that

[8] Ms. Oeung also raised and joined in additional arguments challenging the conspiracy convictions and the attached firearm enhancements, including challenges to the sufficiency of the evidence and under the *corpus delicti* rule. AOB, at pp. 36-41. As with all the issues raised in the Appellant's Opening Brief, as to any issues in the assignments of error on appeal not specifically addressed in this Reply, Ms. Oeung relies on her Opening Brief.

there was an agreement by Soy Oeung with Nolan Chouap and Azariah Ross because she entered the car with those persons, and "that's an express agreement" to a home invasion. 3/3/14RP at 2246. The State then argued that because Oeung and Alicia Ngo later stayed in the car and did "stick around," this was a tacit agreement. 3/3/14RP at 2246-47.

Reversal is required under Petrich because the evidence was not overwhelming, or uncontroverted, as to at least one or more of these claimed conspiratorial agreements. There was no overwhelming evidence that Soy Oeung entered the car in question after making some express or implied agreement with Azariah Ross or Nolan Chouap that the group would commit a robbery, or a first degree burglary or first degree robbery. As defense counsel argued in closing here was no proof that Oeung was agreeing to a robbery plan, or a burglary or robbery with a weapon. 3/3/14RP at 2304-05, 2306-9. The State responded in rebuttal closing by making even more clear that there were multiple acts that could be deemed the armed conspiracy: both (a) that the conspiratorial agreement occurred at some unspecified point in the past, before one of the perpetrators acted to obtain a firearm, which was the substantial step required to complete the proof of guilt on the

conspiracy, and (b) that the agreement was the very commission of the crime itself. 3/3/14RP at 2337-38. But there was certainly no evidence of an agreement made by Soy Oeung before the point in time at which any perpetrator obtained a firearm, and the crime of conspiracy, as defense counsel argued, requires an agreement, not just the mere act of Ms. Oeung going along for the ride to the crime. 3/3/14RP at 2307. Additionally, the State never chose which of multiple firearms it believed supported the alleged agreement to commit crimes elevated to the first degree, which firearm it believed supported the theory that obtaining a firearm was a "substantial step" in the conspiracy, or what firearm supported enhancements attached to the alleged conspiracies.[9] Reversal is required.

**4. THE TRIAL COURT'S DENIAL OF AN EXCEPTIONAL SENTENCE WAS NOT BASED ON A FACTUAL ASSESSMENT, IT WAS BASED ON AN ERRONEOUS BELIEF THAT THE COURT HAD NO LEGAL AUTHORITY.**

Because the trial court in this case plainly desired to impose a downward departure in Ms. Oeung's case, but erroneously believed it did not have the authority to do so, there is appealable error and Ms. Oeung asks that her case, *inter alia*, be remanded for re-sentencing. State v. Schloredt, 97 Wn. App. 789, 801-02, 987

[9] See Appellant's Opening Brief at p. 41; Appellant Ross's supplemental brief at pp. 1, 10.

P.2d 647 (1999); State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989).

Ms. Oeung specifically presented several specific statutory bases for an exceptional sentence, including that RCW 9.94A.535(1)(c) and (d); RCW 9.94A.535(1)(f); and RCW 9.94A.535(1)(g). Counsel's presentation to the court also noted that the court was entitled, under the SRA's guidelines, to impose a downward departure based on any factor mitigating the crimes, that would be legally valid under the SRA's policies and guidelines. 6/23/14RP at 48-49, 57.

The State does not address these factors or the cases raised in Ms. Oeung's Appellant's Opening Brief, which involve mitigating circumstances legally permissible to be employed for purposes of a downward departure. AOB, at pp. 63-66 (citing State v. Evans, 80 Wn. App. 806, 811-13, 911 P.2d 1344 (1996); State v. Nelson, 108 Wn.2d 491, 501, 740 P.2d 835 (1987) ("lesser degree of participation" that is "significantly out of the ordinary for the crime in question"); State v. Moore, 73 Wn. App. 789, 796, 871 P.2d 642 (1994) (defendant's participation was "merely incidental to the overall criminal enterprise"); State v. Alexander, 125 Wn.2d 717,

731 and n. 25, 888 P.2d 1169 (1995) (defendant's lesser role as compared to other parties who participated in the same crime).

Instead, on appeal, the State argues that the trial court refused an exceptional sentence after assessing the facts and determining that they did not warrant a downward departure. SRB, at pp. 149-51. But the record shows the contrary. The court desired to impose a downward departure, specifically stating, as Ms. Oeung noted in her Opening Brief, "I think probably 288 months is enough[.]" 6/23/14RP at 65-66. The court stated that, "if I felt I had the authority based on any of the reasons that have been identified to grant an exceptional sentence, I would consider it." 6/23/14RP at 67.

And again the court expressed its view that the facts warranted a downward departure, stating that its wish to depart downward from the presumptive sentence was because "of where these crimes fall in relation to other crimes that make it seem out of whack at times to me." 6/23/14RP at 67. Later, in the course of sentencing Mr. Ross, the court yet again reiterated that it would have exercised its discretion to impose an exceptional sentence in Ms. Oeung's case. 6/23/14RP at 76.

Importantly, the State mischaracterizes the trial court's statements below and the context of the arguments placed before it. It is true that the court did remark that the statutory scheme of multiple, consecutive firearm enhancements was a "choice that the legislature can make[.]" SRB, at p. 150 (quoting 6/23/14RP at 65-66.

But Ms. Oeung, as the court knew, was requesting and advocating throughout the hearing for an exceptional term below the standard *range on the underlying sentences* for the substantive convictions, and the parties and the court all understood that the mandatory enhancements could not be the subject of a reduction. CP 338-54, CP 328-37; 6/23/14RP at 46-67. Respondent erroneously suggests that the court's remark about the severe, but legally mandated, length of the firearm enhancements, shows that the court was relying on legal reasons for not departing downward.

It is also true that the trial court did correctly note that Ms. Oeung's terrible upbringing and terrible background, and use of drugs, were not proper bases for a downward departure. SRB, at pp. 149-50 (citing 6/23/14RP at 65). But Ms. Oeung's counsel had made clear that drug problems or the reasons for them were not a proper basis for an exceptional sentence. 6/23/14RP at 49-51.

Ultimately, the record shows that the trial court, rather than recognizing that the reasons for which it desired to depart downward were indeed supported by the proper legal bases for an exceptional sentence that the defense cited in its sentencing brief, reacted negatively to the mitigation report author's *extensive* discussion of Ms. Oeung's terrible upbringing and drug issues, which the defense made clear was not a tenable legal basis.

Remand for re-sentencing – hopefully absent that report – will allow the trial court to decide how its repeatedly-expressed desire to impose a downward departure fits with the highly appropriate and legally viable reasons available to it.

**B. CONCLUSION**

Based on the foregoing and on her Appellant's Opening Brief, Soy Oeung requests that this Court reverse her judgment and sentence.

Respectfully submitted this 21st day of September, 2015.

s/*Oliver R. Davis*
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION TWO**

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| Appellant. | ) | |

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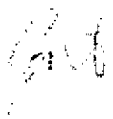

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