

No. 62799-6-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,

v.

ERIC COCKETT,
Appellant.

OPENING BRIEF

Jeffrey E. Ellis, #17139
Law Offices of Ellis, Holmes
& Witchley, PLLC
Seattle, WA 98104
(206) 262-0300
(206) 262-0335

Attorney for Mr. Cockett

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES RELATED TO ASSIGNMENT OF ERROR	1
III.	FACTS	2
IV.	ARGUMENT	4
	A. The Court Conducted a Portion of the Trial in a Closed Courtroom by Watching a Video Deposition in Her Private Chambers	4
	B. Mr. Cockett's Prior Drug Convictions from Alaska are Not Comparable. Counsel Failure to Object Constituted Ineffective Assistance of Counsel	11
V.	CONCLUSION	17

TABLE OF AUTHORITIES

Cases

<i>City of Kennewick v. Day</i> , 142 Wn.2d 1, 11 P.3d 304 (2000)	16
<i>In re Oliver</i> , 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948)	6
<i>In re Restraint of Lavery</i> , 154 Wn.2d 249, 111 P.3d 837 (2005)	11, 14
<i>In re Restraint of Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004)	5, 7
<i>In re Restraint of Thiefault</i> , 160 Wn.2d 409, 158 P.3d 580 (2007)	13
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1982)	6
<i>State v. Adame</i> , 56 Wash. App. 803, 806, 785 P.2d 1144 (1990)	16
<i>State v. Bailey</i> , 41 Wash. App. 724, 706 P.2d 229 (1985)	15
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995)	<i>passim</i>
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005)	5, 7
<i>State v. Cleppe</i> , 96 Wn.2d 373, 635 P.2d 435 (1981)	15
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006)	<i>passim</i>
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.3d 452 (1999)	12
<i>State v. Jackson</i> , 129 Wn. App. 95, 117 P.3d 1182 (2005)	13
<i>State v. Lucero</i> , 140 Wn. App. 782, 167 P.3d 1188 (2007)	13
<i>State v. McCorkle</i> , 137 Wn.2d 490, 973 P.2d 461 (1999)	13
<i>State v. Morley</i> , 134 Wn.2d 588, 952 P.2d 167 (1998)	12
<i>State v. Morris</i> , 70 Wn.2d 27, 422 P.2d 27 (1966)	16
<i>State v. Ross</i> , 152 Wn.2d 220, 95 P.3d 1225 (2004)	13
<i>State v. Stockwell</i> , 159 Wn.2d 394, 150 P.3d 82 (2007)	15

<i>State v. Thomas</i> , 135 Wn. App. 474, 144 P.3d 1178 (2006)	13
<i>United States v. Brazel</i> , 102 F.3d 1120 (11 th Cir. 1997)	5
<i>United States v. Raffoul</i> , 826 F.2d 218 (3d Cir. 1987)	9
<i>Waller v. Georgia</i> , 467 U.S. 39, 46 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)	5
<i>Walton v. Briley</i> , 361 F.3d 431 (7 th Cir. 2004)	10
 <u>Constitutional Provisions, Statutes, and Court Rules</u>	
Alaska Statute § 11.81.900	16
GR 15	6
RCW 9.94A.525	12
RCW 9A.16.090	16
U.S. Constitution, Amend I	5
U.S. Constitution, Amend. VI	<i>passim</i>
Washington Constitution, Article I section 22	5

I. ASSIGNMENTS OF ERROR

A. The trial court erred by conducting a portion of the trial—the viewing of a videotaped deposition—in her private chambers effectively closing a portion of the trial without first conducting a *Bone-Club* hearing.

B. Mr. Cockett’s prior drug convictions from Alaska are not comparable. Thus, the trial court sentenced him using an incorrect offender score. Trial counsel was ineffective for failing to object.

II. ISSUES RELATED TO ASSIGNMENT OF ERROR

A.1. Whether, in a bench trial, the trial court improperly closed the courtroom when she viewed a video-taped deposition in her private chambers without first conducting a *Bone-Club* hearing?

A.2. Whether Mr. Cockett is entitled to relief on appeal for this error despite the lack of objection by his counsel?

B.1. Whether Mr. Cockett’s Sixth Amendment right to effective assistance of counsel was violated when his attorney failed to object to the comparability of two prior drug convictions from Alaska where, although the elements of the crimes are similar, Washington permits defenses which do not exist under Alaska law?

B.2. Whether the current record is sufficient for complete comparability analysis or whether this Court should remand to the trial court for a hearing to determine whether the crimes are factually comparable?

III. FACTS

Procedural History

On October 25, 2007, the King County Prosecutor's Office charged Eric Cockett with one count of Assault in the Second Degree (by strangulation), alleged to have occurred approximately two weeks earlier on October 13, 2007. CP 1. On November 6, 2007, the State amended the *Information*, adding a second count of Rape in the Second Degree alleged to have occurred perhaps more than two years earlier—sometime between September 1, 2005 and December 31, 2006. CP 4-5. Both counts involved the same victim, M.W. *Id.* On September 30, 2008, the State amended the *Information* one more time—adding an aggravating factor to the assault count (committing a crime of domestic violence in the presence of a child). CP 42-43.

Mr. Cockett's trial began with pre-trial motions on the same day as the last amendment to the information—September 30, 2008. After extensive pre-trial hearings, on October 7, 2009, Mr. Cockett waived his right to a jury. RP (10/7/08) 86-90. On October 27, 2008, the court found Mr. Cockett guilty as charged. RP (10/27/08) 5-12. The Court entered written *Findings of Fact* on December 18, 2008. CP 161-65.

Mr. Cockett was sentenced on December 8, 2008. CP 149. The State alleged (CP 80-143), the defense did not dispute (CP 173-75), and the Court found that Cockett's offender score was "5," based in part on three

drug convictions from Alaska—two obtained in state court and one in federal court. CP 155. Based on the corresponding ranges, the Court sentenced Cockett to a maximum of life (with a minimum sentence of 130 months) on the rape count and 41 months on the assault count, an exceptional sentence. Both counts were ordered to run concurrently. CP 176-79.

Mr. Cockett filed a *Notice of Appeal* to this Court on December 3, 2008. CP 160.

Facts

Because none of Mr. Cockett's claims depend on the facts of the alleged crimes, he provides only a brief summary. To be clear, Mr. Cockett, through counsel, is preparing and plans to file a *Personal Restraint Petition* which will focus on the facts. Once that petition is filed, Mr. Cockett will likely move to consolidate his PRP with his direct appeal.

M.W. and Mr. Cockett were partners in a relationship that eventually disintegrated. M.W. alleged that the breaking point came when Mr. Cockett strangled her. RP (10/8/08) 56-73. She further alleged that, earlier in the relationship, after she changed her mind about engaging in a type of sexual intercourse, Mr. Cockett ignored her request to stop and forcibly raped her. RP (10/8/08) 22-27.

Mr. Cockett denied both the assault and the rape. RP (10/16/2008) 113-15; 137-43; 169-88). He testified that the relationship ended acrimoniously, with M.W. assaulting him. RP (10/16/2008) 169-88.

Prior to trial, the Court allowed the State to take the video deposition of Eloise Rice, a social worker who had a conversation with M.W. RP (10/3/2008) 12-126.

During trial, the State offered the testimony of Ms. Rice. RP (10/13/2008) 86-94. In response, the Court indicated that it would watch the video-taped testimony in her chambers. *Id.* Defense counsel did not object. *Id.*

The State then rested its case in chief. *Id.*

IV. ARGUMENT

A. The Court Conducted a Portion of the Trial in a Closed Courtroom by Watching a Video Deposition in Her Private Chambers

Introduction

During trial, the State introduced a video deposition taken because the witness was unavailable at the time of trial. RP (10/13/2008) 86-94. However, rather than play the deposition in open court, the judge retired to her private chambers to watch the testimony. *Id.* Thus, a portion of the trial was conducted in a closed courtroom. No hearing was held prior to the Court's decision to conduct a portion of trial in her private chambers. Defense counsel failed to object. *Id.*

The Sixth Amendment to the United States Constitution and Washington Constitution, Article I section 22 guarantee a criminal defendant the right to a public trial. In addition, the First Amendment to United States Constitution and Article I, section 10 of the state constitution provide the press and the public the right to attend criminal trials.

The constitutional right to a public trial is designed to ensure fairness to the defendant, maintain public confidence in the criminal justice system, provide an outlet for community reaction to crime, ensure that judges and prosecutors fulfill their duties responsibly, encourage witnesses to come forward, and discourage perjury. *See Waller v. Georgia*, 467 U.S. 39, 46 104 S.Ct. 2210, 2215-16, 81 L.Ed.2d 31 (1984). *See also, United States v. Brazel*, 102 F.3d 1120, 1155 (11th Cir. 1997) (public trials ensure participants act responsibly, encourage witnesses to come forward, and discourage perjury).

Washington courts have scrupulously protected the accused's and the public's right to open public criminal proceedings. *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) (state constitution requires open and public trials); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant's public trial rights); *In re Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror

selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed prior to closing a courtroom or sealing documents).¹ See also *In re Oliver*, 333 U.S. 257, 266, 68 S.Ct. 499, 504, 92 L.Ed. 682 (1948) (federal constitutional right to a public trial applicable to the states through 14th Amendment).

There is a strong presumption that courts will remain open. Protection of this basic constitutional right requires a trial court to “resist a closure motion except under the most unusual circumstances.” *Bone-Club*, 128 Wn.2d at 259.

As a result, “a trial court may not close a courtroom without, first, applying and weighing five requirements set out in *Bone-Club* and, second, entering specific findings justifying the closure order.” *Easterling*, at 175 (citing *Bone-Club*, at 258-259). Only after conducting a hearing can the trial court properly weigh and consider the relevant factors.

This Court cannot conduct the necessary hearing for the first time on appeal. Further, a retrospective hearing is impossible. Finally, the issue is

¹ In 2006, the Washington Supreme Court, in its rulemaking capacity, strengthened its commitment to maintaining publicly accessible court proceedings by amending GR 15, the rule governing the destruction, sealing or redaction of court files. That rule reaffirms that sealing, redacting or destroying records is permissible only on a showing of specifically identified compelling privacy or safety concerns.

not cured by repeating that portion of trial over again in a public setting.

These results follow as a matter of logic from the nature of the test. The

Bone-Club requirements are:

1. The proponent of closure. . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right;
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure;
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;
4. The court must weigh the competing interests of the proponent of the closure and the public;
5. The order must be no broader in its application or duration than necessary to serve its purpose;

Easterling, at 175, n.5; *Bone-Club*, at 258-259.

The constitutional presumption of openness may be overcome only by "an overriding interest *based on findings* that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Orange*, 152 Wn.2d at 806 (emphasis added) (quoting *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)). These requirements are necessary to protect both the accused's right to a public trial *and* the public's right to opening proceedings. *Easterling*, at 175.

There was no “closure hearing” in this case. And, if the trial court’s announcement that she intended to view the deposition in her chambers constituted that hearing, it fell far short of the *Bone-Club* requirements. As noted previously, closure was not the least restrictive means available. There was simply no impediment to watching and playing the deposition in open court. Finally, there is no showing that the trial court considered that option, rather than conducting a portion of trial in a closed setting. In addition, there is no place in the record where the court gave any member of the press or public the opportunity to object—an inquiry which, by its definition, must precede the closing of the courtroom.

The next issue is whether the absence in the record of any defense objection results in a waiver of the issue. Once again, the Washington Supreme Court has answered this question holding that is “the request to close itself, and not the party who made the request, that triggered the trial court’s duty to apply the five-part *Bone-Club* requirements. The trial court’s failure to apply that test constitutes reversible error.” *Easterling*, at 180.

Specifically, the *Easterling* Court held that this outcome was compelled by “our prior decisions relating to article 1, section 22 of our state constitution, which require trial courts to strictly adhere to the well-established guidelines for closing a courtroom, and . . .[by] public policy as made manifest by the federal and state constitutions which favors keeping

criminal judicial proceedings open to the public unless there is a compelling interest warranting closure.” *Easterling*, at 177.

Because the trial court must act to protect the rights of both a defendant and the public to open proceedings, “the defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver of the public trial right.” *Brightman*, 155 Wn.2d at 517. This also follows as a matter of logic: a defendant cannot waive the second *Bone-Club* requirement of allowing any interested spectators an opportunity to object before closing a courtroom. In other words, a defendant cannot invite or waive the public’s right to an open trial. *Id.* See also *United States v. Raffoul*, 826 F.2d 218, 225-26 (3d Cir. 1987) (when request is made to close courtroom members of press and public who are present in the courtroom and subject to removal as a result of a closure order must be allowed a hearing on their objections in advance of closure).

The serious contemplation of the prospect of closing a court always triggers the trial court’s duty to conduct a hearing. The failure to object never waives this obligation. Likewise, the decision to close, when challenged on appeal, always requires this Court to review the relevant factors considered below. As a result, it is impossible to conduct the *Bone-Club* analysis for the first time on appeal. When a trial court does not conduct a hearing and does not permit competing interests to be expressed, this Court cannot weigh what is not known.

Thus, the issue is not waived even where the record does not reveal an objection from the defense. *See also Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004) (“we hold that Walton's right to a public trial was not waived by failing to object at trial.”).

“Prejudice is necessarily presumed where a violation of the public trial right occurs.” *Easterling*, 157 Wn.2d at 181, 137 P.3d 825. “The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.” *Id.*

The remedy is reversal and a new trial. *Id.* at 174.

The State may nevertheless argue that this error is somehow removed from the category of structural error because the deposition of the witness was conducted in open court. However, the deposition was a discovery device—it could have been conducted in a private setting. The deposition was not part of the trial. Instead, it became part of the trial when the State successfully introduced the testimony of Eloise Rice during its case-in-chief. The fact that the public could have attended a discovery deposition does not make the closing of a portion of trial harmless.

Instead, the error remains structural. Reversal is required.

B. Mr. Cockett's Prior Drug Convictions from Alaska are Not Comparable. Counsel Failure to Object Constituted Ineffective Assistance of Counsel.

Introduction

A foreign conviction is comparable to a Washington felony when it is clear the defendant would have been convicted of the comparable Washington crime based on the facts admitted or found beyond a reasonable doubt in the foreign jurisdiction. That means both the elements of the crime and the range of available defenses must be substantially similar. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005). Otherwise, a defendant convicted *there* may not have been convicted *here*.

In this case, Mr. Cockett was convicted of two drug offenses in Alaska, a state that does not recognize intoxication as a defense (or apparently, the defense of unwitting possession). Thus, the crimes are not comparable.

However, the issue here is whether this Court should outright reverse or remand for an evidentiary hearing. Because the State apparently presented the complete record from the Alaska convictions to the trial court, this Court can reach the issue on appeal. On the other hand, Mr. Cockett has no objection to the alternative remedy of remand for a hearing to determine comparability. What is clear, at a minimum, is that there is a

serious question regarding the comparability of those convictions. Thus, counsel's failure to argue the issue was ineffective.

The Test for Comparability

Under the Sentencing Reform Act of 1981 (SRA), a defendant's offender score establishes the range a sentencing court may use in determining a sentence. Regarding prior out-of-state convictions, RCW 9.94A.525(3) provides:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

The goal is to ensure that defendants with prior convictions are treated similarly, regardless of where the prior convictions occurred. *State v. Morley*, 134 Wn.2d 588, 602, 952 P.2d 167 (1998).

Plain Error vs. Ineffective Assistance of Counsel

The State bears the burden of proving both the existence and the comparability of an out-of-state conviction. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.3d 452 (1999). A defendant may raise an objection to the inclusion of such a conviction for the first time on appeal. *Ford*, 137 Wn.2d at 477; *see also State v. McCorkle*, 137 Wn.2d 490, 495, 973 P.2d 461 (1999).

A defendant may waive the right to challenge the inclusion of a prior out-of-state conviction by affirmatively acknowledging that a conviction is properly included in the offender score. Appellate courts are generally unwilling to consider a claim raised on direct appeal in that situation because such acknowledgment renders further proof of comparability by the State unnecessary. *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004); *accord, State v. Thomas*, 135 Wn. App. 474, 144 P.3d 1178 (2006); *see also State v. Lucero*, 140 Wn. App. 782, 167 P.3d 1188 (2007); *but see State v. Jackson*, 129 Wn. App. 95, 117 P.3d 1182 (2005).

However, in that situation a defendant may frame the error as claim of ineffective assistance of counsel. *In re Pers. Restraint of Thieffault*, 160 Wn.2d 409, 158 P.3d 580 (2007). In that case, Thieffault's attorney provided deficient representation under *Strickland's* first prong when he did not object to the superior court's comparability analysis. Moving to the prejudice prong—whether there is a reasonable likelihood of a different outcome—the Supreme Court found that although the State may have been able to obtain a continuance and produce the information to which Thieffault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable; in which case, the superior court could not have deemed the Montana conviction a “strike” for purposes of the POAA. In

had objected. Thus, the Supreme Court vacated Thieffault's sentence and remanded the case to the superior court to conduct a factual comparability analysis of the Montana conviction. *Id.*

In this case, although the defense did not contest Cockett's Alaska convictions, the State nevertheless provided the full record. Thus, it appears that this Court can conduct comparability review. If the State disagrees, Mr. Cockett certainly has no objection to remand for an evidentiary hearing *a la Thieffault*.

The Alaska State Court Convictions are not Comparable

Washington law employs a two-part test to determine the comparability of a foreign offense. A court must first query whether the foreign offense is legally comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If a conviction is not *legally* comparable, then the court must examine whether the conviction is *factually* comparable.

To determine if a foreign crime is legally comparable to a Washington offense, the sentencing or reviewing court first looks to the elements of the crime. The comparison of elements includes a careful examination of each required mental state, including the available defenses permitted by the requisite *mens rea*. *In re Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005) (federal crime of robbery narrower than Washington counter-part. “Thus, a person could be convicted of federal bank robbery

without having been guilty of second degree robbery in Washington.

Among the defenses that have been recognized by Washington courts in robbery cases which may not be available to a general intent crime are (1) intoxication; (2) diminished capacity; (3) duress; (4) insanity; and (5) claim of right.”)

“Legal comparability analysis is not an exact science, but when, for example, an out-of-state statute criminalizes more conduct than the Washington strike offense, or when there would be a defense to the Washington strike offense that was not meaningfully available to the defendant in the other jurisdiction or at the time, the elements may not be legally comparable.” *State v. Stockwell*, 159 Wn.2d 394, 397, 150 P.3d 82 (2007).

In this case, while the elements of the crimes are close, there are important differences. Washington recognizes the defense of unwitting possession. If the defendant can affirmatively establish that his possession was unwitting, then he had no possession for which the law will convict. *State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981). This defense is supported by one of two alternative showings: (1) that the defendant did not know he was in possession of the controlled substance (*State v. Bailey*, 41 Wash. App. 724, 728, 706 P.2d 229 (1985) (trial court properly instructed jury that possession not unlawful if defendant did not know drug was in his

or her possession)); or (2) that the defendant did not know the nature of the substance he possessed (*See State v. Adame*, 56 Wash. App. 803, 806, 785 P.2d 1144, *rev denied*, 114 Wn.2d 1030, 793 P.2d 976 (1990) (trial court correctly instructed the jury that possession was unwitting if the person did not know that the substance was present or did not know the nature of the substance)), *Staley*, 123 Wash.2d at 799. This affirmative defense is, of course, in addition to the defenses “of want of possession or that the evidence failed to show beyond a reasonable doubt such possession”. *State v. Morris*, 70 Wn.2d 27, 34-35, 422 P.2d 27 (1966). “The unwitting possession defense is unique to Washington and North Dakota.” *City of Kennewick v. Day*, 142 Wn.2d 1, 10, 11 P.3d 304 (2000).

Because Washington recognizes “unwitting possession” and Alaska does not, the crimes are not legally comparable. Further, under Alaskan law, a defendant cannot claim lack of knowledge where “a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated.” *See Alaska Statute* § 11.81.900(a)(2). *Compare* RCW 9A.16.090. Thus, just as in *Lavery*, there are differences in the requisite mental state and the corresponding defenses. The crimes are not legally comparable.

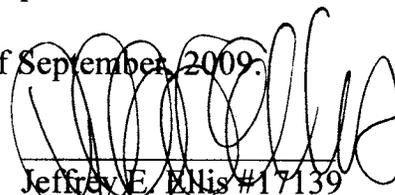
need to show that Mr. Cockett affirmatively disclaimed reliance on the unavailable-in-Alaska defenses of intoxication or unwitting possession. Certainly, if the State believes it can do so a remand hearing is appropriate. However, given that Mr. Cockett entered a “no contest” plea, it is incredibly unlikely that the State could ever make such a showing.

In any event, Mr. Cockett has shown that trial counsel was ineffective in failing to object to the comparability of the two Alaska convictions. This Court should remand for either a new sentencing hearing (subtracting the two convictions) or an evidentiary hearing.

V. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial. In the alternative, this Court should reverse and remand for either a new sentencing hearing or an evidentiary hearing to determine whether the two Alaska convictions are factually comparable.

DATED this 14th of September, 2009.



Jeffrey E. Ellis #17139
Attorney for Mr. Cockett

Law Offices of Ellis,
Holmes & Witchley, PLLC
705 Second Ave., Ste 401
Seattle, WA 98104
(206) 262-0300
(206) 262-0335 (fax)
Jeff@EHWLawyers.com

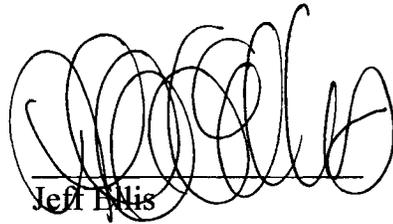
CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on September 14, 2009, I served the party listed below with a copy of the *Opening Brief* by sending it postage pre-paid to:

King County Prosecutor's Office
Attn: Appellate Division
516 Third Ave., 5th Floor
Seattle, WA 98104

9/14/09 Seattle, WA

Date and Place



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