

NO. 63398-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JASON SANDBERG,

Appellant.

REC'D
JAN 26 2010
KING COUNTY SUPERIOR COURT
JULIE SPECTOR

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

The Honorable Cheryl Carey, Judge
The Honorable Julie Spector, Judge
The Honorable Jeffrey Ramsdell, Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 26 PM 3:56

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was unconstitutionally deprived of his right to counsel.

Issue Pertaining to Assignment of Error

Did the trial court err in granting appellant's request to proceed to trial pro se, thereby depriving appellant his constitutional right to the assistance of counsel, when the request to proceed pro se was equivocal because it was made as an alternative to a request for appointment of new counsel?

B. STATEMENT OF THE CASE

The State charged appellant Jason W. Sandberg with one count of failing to register as required under RCW 9A.44.130. CP 17. At a pretrial hearing on November 18, 2008, before the Honorable Cheryl Carey, Sandberg asked to proceed pro se unless the court was willing to appoint new counsel. 1RP¹ 4, 7. Sandberg claimed, his appointed attorney, George Sjursen, would not present the defense he wanted presented and therefore, absent appointment of a new lawyer, he wanted to proceed pro se. 1RP 7-8, 10. In response, the court engaged Sandberg in a colloquy to determine whether he understood what it means to be a pro se defendant and whether he had the ability to proceed without assistance of counsel.

¹ There are ten volumes of verbatim report of proceedings referenced as follows: 1RP - 11/18/08; 2RP - 12/12/08; 3RP 12/26/08; 4RP - 2/4/09; 5RP - 2/5/09; 6RP - 2/9/09; 7RP - 2/10/09; 8RP - 2/11/09; 9RP - 2/12/09; and 10RP - 3/25/09.

1RP 4-11. The court granted Sandberg's request and appointed Sjursen as stand-by counsel. CP 5; 1RP 11.

C. ARGUMENT

THE TRIAL COURT ERRED IN GRANTING SANDBERG'S REQUEST TO PROCEED PRO SE BECAUSE THE REQUEST WAS NOT UNEQUIVOCAL.

Both the Washington and federal constitutions guarantee a criminal defendant the right to assistance of counsel. Wash. Const. art. I, § 22 (amend.10); U.S. Const., Amend. 6, 14. A defendant also has a right to self-representation both under state and federal law. Wash. Const. art. I, § 22 (amend.10); Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Because a tension exists between these two rights, a defendant wishing to proceed pro se must make an "unequivocal" request to proceed without counsel, and the trial court must ensure that the waiver of counsel is "knowing, voluntary, and intelligent." State v. DeWeese, 117 Wn.2d 369, 376-78, 816 P.2d 1 (1991); State v. Hartzell, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 3807645 at 18 (Slip Op. filed November 16, 2009). Self-representation is a grave undertaking, one not to be encouraged, and courts should indulge in every reasonable presumption against waiver. DeWeese, 117 Wn.2d at 379; State v. Chavis, 31 Wn. App. 784, 789, 644 P.2d 1202 (1982); Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

Before granting an unequivocal request to proceed pro se, the trial court must establish the defendant's decision to proceed pro se is made with at least minimal knowledge of what is demanded in pro se representation. City of Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984). The favored way of making this finding is via a colloquy on the record that demonstrates the defendant understood the risks of self-representation. Acrey, 103 Wn.2d at 211. At a minimum, this colloquy should establish that the defendant is aware of the nature and classification of charges against him, the maximum penalty faced if convicted, and the existence of technical and procedural rules that will bind the defendant at trial. DeWeese, 117 Wn.2d at 378; Acrey, 103 Wn.2d at 211; State v. Silva, 108 Wn.App. 536, 541, 31 P.3d 729 (2001). Without this critical information, a defendant cannot make a knowledgeable waiver of his constitutional right to counsel. Silva, 108 Wn.App. at 541.

A request to proceed pro se as an alternative to appointment of new counsel may constitute an "unequivocal" request. State v. Stenson, 132 Wn.2d 668, 740-41, 940 P.2d 1239 (1997), certiorari denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). The Stenson Court explained:

To protect defendants from making capricious waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding

representation, the defendant's request to proceed pro se must be unequivocal. While a request to proceed pro se as an alternative to substitution of new counsel does not necessarily make the request equivocal, Johnstone v. Kelly, 808 F.2d 214, 216, n. 2 (2d Cir.1986), such a request may be an indication to the trial court, in light of the whole record, that the request is not unequivocal. Hamilton v. Groose, 28 F.3d 859, 862 (8th Cir.1994); see also Adams v. Carroll, 875 F.2d 1441, 1445 (9th Cir.1989); People v. Williams, 220 Cal.App.3d 1165, 269 Cal.Rptr. 705, 707-08 (1990).

132 Wn.2d at 740-41.

In Stenson, the defendant first brought a motion for appointment of new counsel. When that was denied, the following colloquy ensued:

THE DEFENDANT: ... I would formally make a motion then that I be able to allow [sic] to represent myself. I do not want to do this but the court and the counsel that I currently have force me to do this.

As I said, I have been under the illusion that I was going to be defended. Not merely as Mr. Leatherman stated the other day, he would cross examine witnesses. That is not a defense.

THE COURT: Mr. Stenson, I do not consider the issue of the trial strategy or trial tactics which are going to be undertaken here as anything which is resolved.

THE DEFENDANT: Excuse me?

THE COURT: I don't consider that resolved. That's a decision between you and your counsel and that will have to be resolved as we get into the trial. And I can't resolve that for you.

As to a motion to represent yourself at this point in the trial, as I have indicated, certainly you have a constitutional right to do that if a motion is timely made.

At this point in time I find that that motion is not timely made and I also find based upon your indications that you really do not want to proceed without counsel.

THE DEFENDANT: But likewise I do not proceed [sic] with counsel that I have.

THE COURT: I understand that. Based upon those considerations, I'm going to deny the motion to allow you to proceed pro se.

132 Wn.2d at 739-40.

In concluding the defendant's request to proceed pro se was not unequivocal, the Stenson Court noted:

Here, almost all of the conversation between the trial judge and the Defendant concerned his wish for different counsel. He repeatedly discussed which new counsel should be assigned. He explained he had contacted a number of attorneys and had asked for permission to talk with his newly-selected counsel. He told the trial court he did not want to represent himself but that the court and his counsel had forced him to do that. More importantly, the Defendant did not refute the trial court's final conclusion that he "really [did] not want to proceed without counsel." Report of Proceedings at 3313. After the trial judge denied the request for substitution of new counsel and the request to proceed pro se, the Defendant, pursuant to a request from the trial court to put his request in writing, filed a written request which sought appointment of new lead counsel, retention of the existing second counsel, appointment of Mr. Leatherman as counsel for the penalty phase, and a continuance. In that request, the Defendant did not mention proceeding pro se. While the Defendant's request was conditional, it was also equivocal based on the record as a whole. The trial court's refusal to allow the Defendant to proceed pro se was not an abuse of its discretion.

132 Wn.2d at 742.

Sandberg's request to proceed pro se and the resulting colloquy is set forth in its entirety below:

THE COURT: The motion to dismiss right now is denied.^[2] My understanding is, at least as of right now, no one else had has an opportunity to speak. Your trial date is today. So what is the other matter that you wanted to go over?

MR. SANDBERG: I'd like to -- well, because you're denying that, I would like to -- I'll go pro se.

THE COURT: Well, let me ask you a few questions. This is required by law.

MR. SANDBERG: Yep.

THE COURT: Let me ask you this: Have you ever studied law before?

MR. SANDBERG: No, Your Honor.

THE COURT: Okay. Have you ever represent yourself or anyone else in a criminal action?

MR. SANDBERG: Right now I am, yes.

THE COURT: Okay. Besides today?

MR. SANDBERG: Yes.

THE COURT: Have you ever represented yourself in a trial before? Tell me a little bit about that.

MR. SANDBERG: I'm pro se on my '06 cause number.

THE COURT: Okay. What charge is that?

MR. SANDBERG: Failure to register.

THE COURT: Okay. And when's the trial on that?

² Earlier in the hearing Sandberg moved pro se for dismissal of the prosecution based on violation of his right to a speedy trial. IRP 3.

MR. SANDBERG: Judge Craighead (phonetic) hasn't made a decision yet on that.

THE COURT: Hasn't made a decision about what?

MR. SANDBERG: It's been three and a half months. I'm still waiting for a decision on that. I filed a motion for a new trial.

THE COURT: So you actually represented yourself during that trial?

MR. SANDBERG: No, it did not go to trial, Your Honor. I'm waiting for a new trial by Judge Craighead. So I've been -- I'm pro se under that.

THE COURT: Do you want to help me understand better?

MR. SJURSEN: Yes. Your Honor, I believe there's a motion to withdraw his plea. He is representing himself on that.

THE COURT: So you actually pled guilty, if I understand correctly, with counsel and now you are moving to withdraw your plea without counsel; is that correct?

MR. SANDBERG: I'm already pro se. It's on the record. I'm already waiting for a ruling on that decision.

THE COURT: Okay, all right. Let me ask you this. I'm going to ask the State, if I can, and I realize you may not be the prosecutor, but you can actually state what the charges are. Go ahead.

MS. MCCULLOCH: I do know. I'm familiar with the case, Your Honor.

THE COURT: All right, thank you.

MS. MCCULLOCH: And his other case as well. Your Honor, the charge in this matter is failure to register as a sex offender, in that he did fail to report weekly as required for a person who has been registered as homeless.

THE COURT: And can you tell me what the standard range is if he were to be found guilty.

MR. SJURSEN: I believe it's 14 to 18 months, Your Honor.

THE COURT: Okay.

MR. SJURSEN: There might be some dispute about that. It was either 12 to 14 or 14 to 18.

THE COURT: Okay. And sir, can you tell me what the maximum penalty is for that charge.

MR. SANDBERG: Five years, \$10,000 fine.

THE COURT: And is that correct?

MS. MCCULLOCH: Yes, it is.

THE COURT: All right, excellent. All right, and you understand that if in fact you are going to be representing yourself, the trial court cannot in any way tell you how to try your case, cannot give you any kind of legal advice or any direction in that?

MR. SANDBERG: That's right, I understand that, Your Honor. I fully understand that. I just want to say the only reason why I'm asking to go pro se, Your Honor, is because I feel -- I'm not disputing the facts of the case of the failure to register. What I'm disputing is my side of the story. That's why my lawyer, I've been trying to tell for months, I'm not disputing the fact of the failure to register. But there was something that happened, and he won't present the defense, and I have a right to.

THE COURT: Well, I'm trying to keep you focused [sic] a little bit here.

MR. SANDBERG: Right.

THE COURT: I want to make sure that you fully understand what it means to have you represent yourself before I can actually grant your request. Are you familiar with the rules of evidence?

MR. SANDBERG: Most of it, yes.

THE COURT: Can you tell me how that has come about.

MR. SANDBERG: I got -- I got rules of evidence in the law books and everything. I mean, I'm not a lawyer, Your Honor. I know where you're going with this. But I feel that I want to represent myself. I feel that my due process rights already have been violated. I want to represent myself. Like I said on record, you know what I mean -- you know what, that's my -- he's not representing me. Now if you want to say you can't go pro se and you want to give me new counsel, well then that's fine. But I want to present a defense, and he's not doing that.

THE COURT: You have indicated to the Court, and I think you have every right to represent yourself. But before I can grant that request, the law requires me to ask you these questions. Then the law requires me to make a determination that you are unequivocally asking to represent yourself, that you fully understand and know what you're doing, that you fully understand the consequences of representing yourself, that you understand that the rules of evidence will govern, any evidence will govern you at trial. The rules of criminal procedure will also govern as well.

It's my obligation to make sure that you understand that. It's my obligation to strongly recommend that you not represent yourself. You have counsel. You've talked about this before. You understand you don't have the right to

choose any attorney. If you want to represent yourself, that's something that you have every right to do. But you will be responsible assuming this goes to trial to doing jury voir dire, jury selection, to follow all the rules. The Court will not be in a position to give you any kind of legal advice. If in fact you are found guilty, it's important that you understand what all the consequences are, which the State has just articulated to you what that might be.

So I am simply making sure that in light of the penalty and in light of the charges and based on whatever information you have in terms of how to proceed to trial, that you fully understand what that means and that you are fully and completely and unequivocally wanting to go to trial. That's all I'm asking you.

MR. SANDBERG: Well, Your Honor, I just want to address the Court. If my lawyer would go with the defense like you just said on the record, as a defendant, I have the right to present any defense to trial. I mean, I told him months ago this is the defense I want to use. You know, he doesn't even say -- there's no dispute about the failure to register. The point is what happened, he knows that. He won't go out there. 15 hours of investigation services, 15 hours. And the State's -- I mean, he can't even get a hold of the State's witnesses for some reason. I say why don't you get a subpoena.

THE COURT: The real issue that I'm addressing right now is whether or not it is your desire. You came out here, you've asked the Court to go pro se. I'm simply wanting to make sure that you understand what that means and that you have the ability to do so. Even if you don't, that you fully do understand and that you are adamant that this is what you want to do. My question is: Is this what you want to do? Do you want to represent yourself?

MR. SANDBERG: That's right, Your Honor.

THE COURT: All right. And do you want standby counsel?

MR. SANDBERG: Yes.

THE COURT: All right. Then I am going to find that you have knowingly, voluntarily and unequivocally waived your right to counsel, that this is what you wish to do, that you are aware of the nature of the charges, the maximum penalty. You're aware of what the standard range might be. You have indicated that you're currently representing yourself in another matter. Therefor[e] I will make that finding. I am, counsel, going to appoint you as standby counsel. It's important that you understand that does not mean he is your attorney per se, but he is there to assist you in any way that he can. So --

1RP 4-11 (emphasis added).

Like the defendant in Stenson, Sandberg never made an unequivocal request to proceed pro se. To the contrary, the record shows Sandberg repeatedly stated a preference for his current counsel to present his defense, or for the court to appoint new counsel willing to do so. 1RP 7-8, 10. It appears the court failed to comprehend this, and instead focused on engaging Sandberg in the colloquy required after an unequivocal request to proceed pro se. See 1RP 7-8, 10 (in response to Sandberg's complaints about his counsel's refusal to present his defense, the trial court redirects the discussion to completing the colloquy rather than establishing whether his request was unequivocal). Because no such unequivocal request was made here, this Court should reverse Sandberg's conviction.

D. CONCLUSION

Because Sandberg was unconstitutionally denied his right to counsel, this Court should reverse his conviction and remand for a new trial.

DATED this 26th day of January, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CHRISTOPHER H. GIBSON,
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Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63398-8-1
)	
JASON SANDBERG,)	
)	
Appellant.)	

DECLARATION 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 26TH DAY OF JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON SANDBERG
2500 SOUTH 370TH STREET, NO. 171
FEDERAL WAY, WA 98003

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF JANUARY, 2010.

x *Patrick Mayovsky*

NO. 63759-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

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BARNEY FURSETH,

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The Honorable Regina Cahan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE STATE'S ATTEMPT TO RECAST THE ISSUE FROM "JURY UNANIMITY" TO "UNIT OF PROSECUTION" SHOULD BE REJECTED.

Some might call it "creative." Others might be reminded of the "bait and switch" tactics of a used car salesman. And the pragmatist might generously refer to it as "specious." Whatever its proper name, this Court should reject the State's attempt to recast the "jury unanimity" issue raised by Furseth on appeal into a "unit of prosecution" issue, reverse Furseth's conviction and remand for a new, fair trial.

Relying on State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009),¹ the State claims that because the crime of possession of child pornography constitutes a single act, regardless of the number of illicit depictions actually possessed, Furseth was not entitled to a unanimity instruction. Brief of Respondent (BOR) at 5-14. This claim is based on the faulty assumption that it was undisputed whether particular images found on Furseth's computer constituted child pornography. See BOR at 13 (the State assumes, without citation to authority, that exhibits 4 and 15 were indisputably child pornography). The State is wrong.

¹ In Sutherby, the Court held "that the proper unit of prosecution under former RCW 9.68A.070 is one count per possession of child pornography, without regard to the number of images comprising such possession or the

As discussed in the opening brief, and as recognized by both the prosecution and defense at trial, whether any particular image found on Furseth's computer depicted a minor engaged in sexually explicit conduct, such that it constituted child pornography, and whether Furseth knew or should have known the person depicted was a minor, were factual issues for determination by the jury. CP 47 (Instruction 9, "to-convict"); 3RP 109-16 (prosecutor's closing argument regarding why the jury should find the images were child pornography and that Furseth knew it); 3RP 116-24 (defense counsel's closing remarks focused on the lack of evidence supporting a finding that Furseth knowingly possessed the images found on his computer); Brief of Appellant (BOA) at 5-7. That Furseth's jury requested during deliberations to see exhibits that had not been admitted is an indication these may not have been easy issues to decide. CP 63.

It is safe to declare that as a matter of law Furseth could only be convicted of a single count of possessing a depiction of a minor engaged in sexually explicit conduct, regardless of the number of offending depictions actually possessed. Sutherby, 165 Wn.2d at 882. What cannot be declared is that any particular image presented to the jury constituted a depiction of

number of minors depicted in the images possessed." 165 Wn.2d at 882.

a minor engaged in sexually explicit conduct, and that Furseth knew the person in the depiction was a minor.

Certainly there is a rational basis for a juror to conclude that one or more of the 28 images contained in exhibits 4, 13, 14 and 15 constituted depictions of minors engaged in sexually explicit conduct, and that Furseth knew or should have known the persons depicted were minors. But there is also a rational basis for a juror to conclude to the contrary with regard to any one image.

For example, exhibits 13 and 14 depict what appear to be nude male minors exposing their "genitals or unclothed pubic or rectal areas." CP 52 (Instruction 14, defining "sexually explicit conduct"). Whether these anatomical features are being exhibited "for the purpose of sexual stimulation of the viewer", however, is not so apparent and is therefore susceptible to differing opinions by individual jurors.

The images in exhibits 4 and 15 are similarly subject to individual interpretation. As the investigating detective conceded, determining whether the person depicted is a child or not "gets a little tricky[.]" 3RP 43.

It is this trickiness that required the court to provide a unanimity instruction. . State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988);

State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); State v. Vander Houwen, 163 Wn.2d 25, 37-38, 177 P.2d 93 (2008); Wash. Const. art. 1, §22; U.S. Const. Amend 6. Absent this instruction, it cannot be said the guilty verdict against Furseth was the product of a unanimous jury determination and therefore reversal is required. Vander Houwen, 163 Wn.2d at 38-40; Kitchen, 110 Wn.2d at 409, 411-12.

2. STATE V. HUCKINS DOES NOT SUPPORT THE STATE'S CLAIM THAT A UNANIMITY INSTRUCTION WAS NOT REQUIRED.

In addition to the "unit of prosecution" holding in Sutherby, the State relies on this Court's decision in State v. Huckins, 66 Wn. App. 213, 836 P.2d 230 (1992), review denied, 120 Wn.2d 1020 (1993), to claim a unanimity instruction was not required here. BOR at 7-8 n.6. The State's reliance on Huckins is misplaced. Contrary to the State's claim, Huckins actually supports Furseth's claim that a unanimity instruction should have been given.

While searching Huckins' residence under a warrant, police found four magazines, each apparently containing images of nude minors. The State charged one count for each magazine. Huckins was convicted on two of the four counts. 66 Wn. App. at 214-15.

On appeal, Huckins argued the trial court should have either given

the jury a unanimity instruction or required the State to elect the specific depictions within each magazine upon which it would rely. Huckins argued the failure to give the instruction or require election permitted the jurors to rely on different depictions in the magazines to find him guilty. 66 Wn. App. 220-21. The State responded that possession of the magazine constituted a single transaction; therefore, neither an election nor a unanimity instruction was required.² 66 Wn. App. at 221.

This Court sided with the state:

The Petrich rule only applies if the State presents evidence of "several distinct acts." State v. Handran, 113 Wn.2d 11, 17, 775 P. 2d 453 (1989), quoting Petrich, 101 Wn.2d at 571, 683 P.2d 173. Possessing a single publication containing illegal depictions cannot properly be characterized as a series of several distinct acts. The act of possessing such a publication is a single act.

Huckins, 66 Wn. App. at 221.

In a concluding footnote, however, the Court noted:

In so holding, however, we note that the issue is not before us of whether Petrich would apply if someone is charged with possession of two or more depictions not contained within a single publication. Such a situation could indeed amount to several distinct acts requiring either a Petrich instruction or an election by the State, depending upon the facts then presented.

² Notably, each of the four to-convict instructions identified a different magazine title. It thus appears there was an election, at least as to which magazine applied to which count. 66 Wn. App. at 215-16.

66 Wn. App. at 222 n.5.

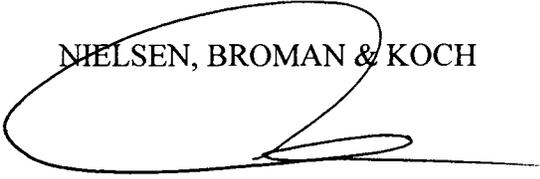
The situation here is precisely that discussed in the Huckins footnote. The State presented several separate and distinct images it claimed constituted child pornography in an effort to convict Furseth of one count of possessing child pornography. There is no basis to conclude these images were contained in a single publication. Therefore, even under Huckins, a Petrich instruction was required to ensure any resulting guilty verdict was unanimous. Because that did not happen, reversal is required.

B. CONCLUSION

For the reasons stated herein and in appellant's opening brief, this Court should reverse Furseth's conviction.

DATED this 26th day of January, 2010.

Respectfully submitted,


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Office ID No. 91051

Attorneys for Appellant

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DECLARATION 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 26TH DAY OF JANUARY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BARNEY FURSETH
 DOC NO. 330867
 McNEIL ISLAND CORRECTIONS CENTER
 P.O. BOX 881000
 STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF JANUARY 2010.

x *Patrick Mayovsky*