

NO. 37727-6

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COURT OF APPEALS  
DIVISION II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON  
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

MIGUEL DIAZ ELROD, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John R. Hickman

No. 06-1-05769-6

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**BRIEF OF RESPONDENT**

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GERALD A. HORNE  
Prosecuting Attorney

By  
KAREN A. WATSON  
Deputy Prosecuting Attorney  
WSB # 24259

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly deny defendant's court appointed counsel's untimely motion to withdraw at sentencing where the sentencing hearing had already been continued on one occasion and defendant did not show good cause as to why withdrawal and substitution was required? Alternatively, was any error harmless when defendant's trial counsel was effective?

2. Did the trial court properly proceed with the sentencing hearing where defendant made no motion to withdraw his guilty plea prior to entry of judgment? Alternatively, was any error harmless when defendant's plea was knowingly, voluntarily, and intelligently entered?

B. STATEMENT OF THE CASE.

1. Procedure

On December 7, 2006, under the above cause number the State charged Miguel Martine Diaz Elrod, hereinafter "defendant," with first degree murder of Saron Tith while armed with a firearm with the aggravating factor that defendant committed the offense to obtain or maintain his membership or advance his position in the hierarchy of an association. CP 1-2. Defendant was also charged with an unrelated murder under Pierce County Cause No. 06-1-05762-9. *See* CP 55-56. On

March 4, 2008, after several days of motions in limine, the parties began picking a jury. 3/4/08 RP 3. After jury selection began, the parties continued to negotiate a plea agreement through the lunch hour. 3/4/08 RP 3.

When court resumed after lunch, the court was informed that a plea agreement was reached. 3/4/08 RP 3-4. Under the plea agreement, the State would file a second amended information charging defendant with second degree murder of Saron Tith and dropping the firearm enhancement and the aggravating factor. *See* CP 54. The State also agreed to dismiss the second murder charge against defendant under Pierce County cause number 06-1-05762-9. CP 57-65, §6(g). Under the plea agreement the parties would jointly recommend a high end standard range sentence of 265 months, plus standard fines and costs, and 24 to 48 months community custody. *See* CP 57-65, §6(g); 5/2/08 RP 10.

The State strictly complied with the plea agreement. The deputy prosecuting attorney filed the second amended information charging defendant with second degree murder and dropping the aggravating factor and sentencing enhancement. CP 54. The prosecuting attorney dismissed defendant's second murder charge under Pierce County Cause No. 06-1-05762-9. 5/2/08 RP 5, 22. The defendant pled guilty to the second amended information, which charged him with second degree murder with no firearm enhancement and no aggravating factors. CP 54; 3/4/08 RP 16. Prior to accepting defendant's guilty plea, the court carefully reviewed

defendant's constitutional rights with him, including the rights he would be giving up by entering a guilty plea. 3/4/08 RP 10-11. The court also reviewed defendant's offender score, his standard range, the mandatory community custody, and the maximum penalty the court could impose if defendant pled guilty. 3/4/08 RP 11-12. The court asked defendant if he was making his plea voluntarily. 3/4/08 RP 14-16. Defendant advised the court he understood the plea he was entering and the consequences of that plea; defendant told the court that no one had made any threats or promises to him to get him to enter the plea; and defendant assured the court he wanted to proceed with the plea. 3/4/08 RP 9-16.

After accepting defendant's plea, the court set a sentencing hearing for April 25, 2008. CP 88; 3/4/08 RP 17. The April 25, 2008, sentencing hearing was continued to May 2, 2008. CP 89. At the May 2, 2008, sentencing hearing, defendant's court appointed counsel attempted to withdraw. 5/2/08 RP 3-4. The court denied his request and proceeded to sentencing. 5/2/08 RP 7-22. The court followed the joint sentencing recommendation and sentenced defendant to 265 months in prison, 24-48 months community custody, and imposed standard costs and fines. 5/2/08 RP 21-22; CP 68-79.

C. ARGUMENT.

1. THE COURT PROPERLY DENIED DEFENSE COUNSEL'S MOTION TO WITHDRAW AT THE SENTENCING HEARING BECAUSE IT WAS UNTIMELY AND BECAUSE HE WAS UNABLE TO SHOW GOOD CAUSE TO SUPPORT HIS MOTION.

A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. *State v. DeWeese*, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991)(citing *Wheat v. United States*, 486 U.S. 153, 159 n.3, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). The court's decision to deny defendant's motion for withdrawal and substitution of court appointed counsel is reviewed for abuse of discretion. *DeWeese*, 117 Wn.2d at 376; *Wheat*, 486 U.S. at 164; *State v. Sinclair*, 46 Wn. App. 433, 730 P.2d 742 (1986).

"A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense. *Stenson*, 132 Wn.2d 668, 734. Factors the court considers when deciding a motion to withdraw and substitute court appointed counsel are: (1) the extent of the conflict; (2) the adequacy of the trial court's inquiry

regarding the conflict; and (3) the timeliness of the motion. *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001) (adopting the test set forth in *United States v. Moore*, 159 F.3d 1154, 1158-59 (9<sup>th</sup> Cir. 1998)).

In the present case, the defendant offered no basis to the court in support of his motion to substitute counsel. 3/4/08 RP 4-7. Trial counsel advised the court “Mr. Diaz-Elrod has asked me to withdraw as his counsel and have the Department of Assigned Counsel appoint him new counsel, to explore withdrawing his guilty plea in this matter.” 3/4/08 RP

4. Trial counsel then stated:

Based upon his assertions to me as to why he wants to withdraw the plea, I believe it would be prudent for me to withdraw, based upon his statements to me about the basis for the withdrawal, and that [Department of Assigned Counsel] appoint Mr. Diaz-Elrod other counsel.

I’ve asked Mike Kawamura, Director of Department of Assigned Counsel, to attend today, so that if the court accepts that, that the Department can be on notice that they need to have someone meet with Mr. Diaz-Elrod immediately, so that that issue can be addressed.

3/4/08 RP 4. Because no good cause had been offered in support of defendant’s motion, the prosecutor, who had only been made aware of the motion minutes before the hearing began, argued against allowing a substitution of counsel. 3/4/08 RP 5. The prosecutor advised the court that “[t]f there is some legitimate basis, at least the Court needs to be apprised of the nature of the problem.” 3/4/08 RP 5. The court inquired

of Mr. Kawamura whether he had any additional information for the court regarding defendant's motion. 3/4/08 RP 6. Mr. Kawamura advised the court that he had no information for the court regarding the specific reasons for the motion to substitute counsel. 3/4/08 RP 6. In fact, Mr. Kawamura told the court "I really can't articulate to the Court the basis for this." 3/4/08 RP 6.

Additionally, a trial court must balance a defendant's interest in counsel of his choice against the public's interest in prompt and efficient administration of justice. *State v. Roth*, 75 Wn. App. 808, 824-25, 881 P.2d 268 (1994). Here, defendant's motion to substitute counsel was made at the May 2, 2008 sentencing hearing. 5/2/08 RP 3-4. The court had already continued sentencing from the original April 25, 2008, sentencing hearing to the May 2, 2008, date. CP 88, 89. Representatives from both the victim's family and the defendant's family were present and ready to address the court at the May 2, 2008, sentencing hearing. 5/2/08 RP 9-10, 14-17. Defendant's motion to substitute counsel would have further delayed the sentencing hearing and would have impacted family members for both the victim and the defendant.

The court properly denied defendant's motion because no good cause was ever proffered to the court in support of defendant's motion and the motion, made orally on the day of the sentencing hearing, was untimely. However, if this court were to find the sentencing court erred

when it denied defendant's motion to substitute counsel any error would be harmless because defendant cannot show trial counsel was ineffective.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L. Ed. 2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First, a defendant must establish that defense counsel's representation fell below an objective standard of reasonableness. Second, a defendant must show that defense counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687; *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A

reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the “heavy burden of showing that his attorney ‘made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’” *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992)(quoting *Strickland v. Washington*, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney’s conduct failed to meet an objective standard of reasonableness. *State v. Huddleston*, 80 Wn. App. 916, 912 P.2d 1068 (1996). There is a strong presumption that counsel’s representation was reasonable and, taking into consideration the entire record, that counsel made all significant decisions in the exercise of reasonable professional judgment. *State v. McFarland*, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. *State v. Hendrickson*, 129 Wn.2d at 77-78. The decision of when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant carries the burden of demonstrating that there was no legitimate

strategic or tactical rationale for the challenged attorney conduct.

*McFarland*, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objection had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. *McFarland*, 127 Wn.2d at 337; *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

In the present case, defendant does not allege, nor does he have any basis to allege, that trial counsel was deficient. Prior to pleading

guilty, defendant was charged with two counts of murder; one count under this cause number and a separate murder under Pierce County Cause No. 06-1-05762-9. *See* CP 1-2, 55-56, 57-65, §6(g). Defendant pled guilty to one count of second degree murder, with no sentencing enhancements or aggravating factors. CP 54, 57-65. The plea agreement negotiated by trial counsel resulted in the dismissal of one murder count under Pierce County Cause Number 06-1-05762-9, the elimination of a firearm sentencing enhancement and an aggravating factor from the one count to which defendant did plead guilty. *See* CP 55-56, 57-65; 5/2/08 RP 22. When defendant pled guilty to second degree murder, he agreed to a joint sentencing recommendation of 265 months in prison, which is a high end, standard range sentence. 5/2/08 RP 10. If defendant had been convicted of first degree murder, his standard range would have been 281-374, without the firearm sentencing enhancement. Adult Sentencing Guidelines Manual, III-150 (2007). Additionally, if defendant had been convicted on the murder charge under Cause No. 06-1-05762-9, even if sentenced for both on the same day, the sentences would have run consecutive to each other because both are serious violent offenses. *See* RCW 9.94A.589.

Rather than being deficient, defendant's trial counsel was exceptionally effective in negotiating the plea agreement, which eliminated the risk of a consecutive sentence and minimized defendant's risk on the charged to which he pled guilty by negotiating a lesser degree

and the elimination of an aggravating factor and firearm enhancement. The court even commented on trial counsel's effectiveness at sentencing when he stated "And I think counsel for the defense has accomplished something very major for his client, in order for this to come about, because I know the philosophy of the prosecutor's office, in regards to these charges, and they're very aggressive." 5/2/08 RP 21.

Defendant cannot show he was prejudiced by trial counsel's actions. In fact, defendant only benefited from the plea agreement trial counsel negotiated. Because defendant cannot show he was prejudiced by trial counsel's action, the court must find that defendant has failed to meet his burden under *Strickland*. Therefore, in the unlikely even that this court were to find that the trial court erred in denying defendant's court appointed attorney's untimely motion to substitute counsel, this court must find that the error was harmless because defendant cannot show his trial counsel was ineffective.

2. DEFENDANT DID NOT MOVE TO WITHDRAW HIS GUILTY PLEA AND THE COURT PROPERLY DID NOT RULE ON A MOTION THAT WAS NOT BEFORE IT. ALTERNATIVELY, IF THIS COURT WERE TO FIND DEFENDANT DID MOVE TO WITHDRAW HIS GUILTY PLEA, THIS COURT HAS SUFFICIENT RECORD BEFORE IT TO DENY DEFENDANT'S MOTION.

Defendant argues that the trial court erred when it declined to hear defendant's motion to withdraw his guilty plea. Defendant's argument is without merit because a careful review of the record shows that defendant did not make a motion to withdraw his plea. Instead, defendant's trial counsel advised the court that defendant "*has asked me to withdraw as his counsel and have the Department of Assigned Counsel appoint him new counsel, to explore withdrawing his guilty plea in this matter.*" 5/2/08 RP 4. In explaining the basis for his motion to withdraw and substitute counsel, trial counsel further stated that the week before the sentencing hearing, defendant stated "he would go forward with sentencing," but this week "he's been adamant that he would like to withdraw his plea." 3/4/08 RP 4. Trial counsel advised the court that he felt it would be prudent for him to withdraw based upon defendant's statements to trial counsel as to the basis for defendant's motion to withdraw his plea. 3/4/08 RP 4. It is clear from the above that trial counsel's motion to withdraw as counsel of record was, at least in part, premised on basis defendant had articulated for defendant's desire to withdraw his plea. It is also clear that trial counsel

was seeking to withdraw so defendant could explore the possibility of withdrawing his plea with new counsel; trial counsel was not making a motion to withdraw defendant's guilty plea.

It is also apparent from the record that the trial court did not believe defendant had made a motion to withdraw his guilty plea. When he denied trial counsel's motion to withdraw and substitute counsel, the court stated:

This, in no way, limits Mr. Elrod from retaining counsel or being – having new counsel assigned to this case after the sentencing, and bringing forth the motion to set aside the plea of guilty, but I do not believe it would be in the interest of justice, nor do I believe there would be any prejudice to the defendant, to having counsel proceed and be attorney of record through this sentencing, based upon the history of this case.

And again, I'm not ruling or making any – attempting to make any rulings on the issue of him having an opportunity to bring a motion for setting aside the verdict<sup>1</sup>; I think that's his absolute right....

3/4/08 RP 7. Instead of denying or refusing to hear a motion to withdraw the plea, the court properly denied an untimely motion to substitute counsel and proceeded to sentencing. Had defense counsel made a motion to withdraw as defendant claims in his brief, then some basis to support that motion would have been offered to the court. Here, consistent with

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<sup>1</sup> The court incorrectly used the term "motion for setting aside the verdict," but later corrects himself to say motion to withdraw his plea. 3/4/08 RP 8.

no motion being made to the court, no basis to support such a motion was offered to the court.

Assuming *arguendo*, this court were to find that defendant did make motion to withdraw his guilty plea, there is no basis in the record to support the granting of that motion. This court can affirm a trial court on any other ground appearing in the record and may review a challenge to the voluntariness of defendant's plea for the first time on appeal. *State v. Walsh*, 143 Wn.2d 1, 6-7, 17 P.3d 591 (2001).

Due process requires that when a criminal defendant pleads guilty, his plea be knowing, voluntary, and intelligent. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004)(citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)). "When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea's voluntariness." *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982) (citing *In re Keene*, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); *In re Teems*, 28 Wn. App. 631, 633, 626 P.2d 13 (1981); *State v. Ridgley*, 28 Wn. App. 351, 623 P.2d 717 (1981)).

A defendant must be informed of all direct consequences of his plea. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298. “A ‘direct’ consequence is one that ‘represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.’” *State v. Matthews*, 128 Wn. App. 267, 271-72, 115 P.3d 1043 (2005)(quoting *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)). The burden is on the State to show that the defendant knew of all direct consequences of his plea. *Ross* 129 Wn.2d at 287 (citing *Wood v. Morris*, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976)). The State may meet this burden through the record of the plea hearing or other “clear and convincing extrinsic evidence.” *Ross* 129 Wn.2d at 287 (citing *Morris* 87 Wn.2d at 511). In regards to unexpected sentence provisions, a defendant must establish that the provision was a direct consequence of his plea. *State v. Smith*, 137 Wn. App. 431, 437, 153 P.3d 898 (2007).

In the present case, defendant’s plea was knowing, intelligent, and voluntary. Defendant decided to plead guilty to an amended information after trial commenced. 3/4/08 RP 2, 4. The court had heard motions in limine and jury selection had begun. 3/4/08 RP 3. Prior to taking the plea, the court announced that it was “not going to do anything to dismiss any of the juror [sic] panel or jury members until the plea has, in fact, been

taken and I'm satisfied that this plea is freely and voluntarily given without any undue pressure for any source." 3/4/08 RP 4.

Trial counsel advised the court that he had read each and every paragraph of the statement of defendant on plea of guilty to defendant while defendant read the document to himself. 3/4/08 RP 4. After they read each paragraph (trial counsel to defendant and defendant to himself), defendant initialed that paragraph. 3/4/08 RP 4. Trial counsel went over with defendant the constitutional rights defendant would be giving up by pleading guilty, the standard range sentence for the offense, the mandatory community custody, and the maximum sentence that could be imposed as a result of defendant's plea. 3/4/08 RP 4.

Prior to taking defendant's plea, the trial court verified that defendant could read and write the English language. 3/4/08 RP 9. That defendant and his attorney read through the statement of defendant on plea of guilty and that defendant's attorney was able to answer any and all questions defendant may have had regarding that document. 3/4/08RP 9. The court advised defendant of the elements the State must prove if the parties went to trial on the amended charge of second degree murder and the rights defendant would be giving up if he pled guilty rather than went to trial. 3/4/08 RP 9-10. The court also reviewed defendant's offender score (a 4) and his standard range (165-265 months), the mandatory

community custody (24-48 months), and the maximum penalty (life in prison) the court could impose. 3/4/08 RP 11-12. The court also reviewed the State's recommendation of 265 months in prison, credit for time served,<sup>2</sup> 24-48 months community custody, standard court costs and fines, Department of Assigned Counsel recoupment costs, and the State's agreement to dismiss the pending murder case under Pierce County Cause No. 06-1-05762-9. 3/4/08 RP 13. The court then stated:

COURT: Line 8 [of the statement of defendant on plea of guilty] indicates the following: That you make this plea freely and voluntarily. Is that true, sir?

DEFENDANT: Yes, Your Honor.

COURT: Has anyone threatened any harm of any kind to you in order for you to make this plea?

DEFENDANT: No, Your Honor.

COURT: Has anyone made any promises to you in order to make this plea other than what's contained in that statement?

DEFENDANT: No, Your Honor.

3/4/08 RP 9-15. Defendant's answers to the court confirmed that he

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<sup>2</sup> Because defendant was pleading guilty to second degree murder on this cause number and the other murder charge was being dismissed, the recommendation was for defendant to receive the credit for time served on whichever cause number gave him the most credit. 3/4/08 RP 12, 13.

understood the charge to which he was pleading guilty and the consequences of his guilty plea. *Id.*

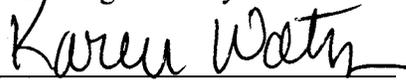
It is clear from defendant's signature on the statement of defendant on plea of guilty defendant signed prior to pleading guilty; his trial counsel's representations to the court, and defendant's answers to the court's thorough inquiry, that defendant's plea was knowing, intelligent, and voluntary. "When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable." *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996)(quoting *Perez*, 33 Wn. App. at 26-162). Therefore, even if this court were to determine that defendant did make a motion to withdraw his guilty plea, the court has before it a sufficient record to determine that his motion is without merit and should be denied.

D. CONCLUSION.

For the reasons stated above, this court should affirm defendant's conviction and sentence.

DATED: FEBRUARY 4, 2009.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney



KAREN A. WATSON  
Deputy Prosecuting Attorney  
WSB # 24259

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

  
Date Signature

FILED  
COURT OF APPEALS  
DIVISION II  
09 FEB -4 PM 4:17  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
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