

NO. 39429-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES PHILIP DOUGLAS,

Appellant.

FILED
COURT OF APPEALS
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STATE OF WASHINGTON
BY

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

The Honorable Thomas J. Felnagle, Judge
The Honorable Richard E. Culpepper, Judge
The Honorable Susan K. Serko, Judge
The Honorable Bryan E. Chushcoff, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENTS</u>	9
1. DOUGLAS WAS DENIED HIS RIGHT TO COUNSEL AT RESENTENCING.	9
2. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY WHEN IT IMPOSED A NO-CONTACT ORDER THE DURATION OF WHICH EXCEEDED THE MAXIMUM ALLOWED BY STATUTE.	14
D. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>City of Bellevue v. Acrey</u> 103 Wn.2d 203, 691 P.2d 957 (1984).....	11, 13
<u>In re Davis</u> 152 Wn.2d 647, 101 P.3d 1 (2004).....	11
<u>State v. Chavis</u> 31 Wn. App. 784, 644 P.2d 1202 (1982).....	10
<u>State v. DeWeese</u> 117 Wn.2d 369, 816 P.2d 1 (1991).....	10, 11, 13
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	14, 16
<u>State v. Guerin</u> 63 Wn. App. 117, 816 P.2d 1249 (1991) <u>review denied</u> 118 Wn.2d 1015 (1992).....	16
<u>State v. Hartzell</u> 153 Wn. App. 137, 221 P.3d 928 (2009).....	10
<u>State v. Horton</u> 136 Wn. App. 29, 146 P.3d 1227 (2006) <u>review denied</u> , 162 Wn.2d 1014, 178 P.3d 1032 (2008)	10
<u>State v. James Philip Douglas</u> Nos. 34451-3-II & 34461-1-II (consolidated) (Slip Op. filed September 8, 2008).....	2
<u>State v. Moen</u> 129 Wn.2d 535, 919 P.2d 69 (1996).....	15
<u>State v. Paine</u> 69 Wn. App. 873, 850 P.2d 1369 <u>review denied</u> , 122 Wn.2d 1024 (1993).....	15

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Parsley</u> 73 Wn. App. 666, 870 P.2d 1030 (1994).....	16

<u>State v. Silva</u> 108 Wn.App. 536, 31 P.3d 729 (2001).....	11, 13
---	--------

FEDERAL CASES

<u>Brecht v. Abrahamson</u> 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed.2d 353 (1993).....	12, 14
--	--------

<u>Brewer v. Williams</u> 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).....	10
---	----

<u>Faretta v. California</u> 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).....	10
--	----

<u>Penson v. Ohio</u> 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed.2d 300 (1988).....	12
--	----

<u>United States v. Cronic</u> 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed.2d 657 (1984).....	11
--	----

RULES, STATUTES AND OTHER AUTHORITIES

Chapter 9A.20.....	15
Chapter 9.94A.....	15
Former RCW 9.94A.411(2).....	15
Former RCW 9.94A.505(8).....	15
Former RCW 9.94A.700(5).....	15

TABLE OF AUTHORITIES (CONT'D)

	Page
Former RCW 9.94A.700(5)(b)	16
Former RCW 9.94A.715(1), (2)(a)	16
RAP 2.5.....	9
RCW 9A.20.021	15, 16
RCW 9A.36.021	16
RCW 9.94A.345	15
Sentencing Reform Act.....	15

A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to counsel at resentencing.

2. The trial court erred when it prohibited contact for a term in excess of the statutory maximum for the crime of conviction. CP *148-49*.¹

Issues Pertaining to Assignment of Error

In August 2004, Appellant was charged with fourth degree assault and second degree assault. A bail jumping charge was later added. In November 2004, Appellant was charged under a separate cause number with first degree arson, residential burglary, and violation of a domestic violence court order. The charges were joined for trial and Appellant was convicted of all six offenses. The convictions for arson, residential burglary and court order violation were reversed on appeal and remanded for retrial. The convictions for the assaults and bail jumping were remanded for resentencing.

1. Where Appellant formally waived his right to counsel for the retrial, but not for resentencing, was Appellant denied his

¹ The "CP" numbers cited with an *italicized* font are those counsel expects will apply once the indexing is completed for the supplemental designation of clerks papers filed on March 3, 2010. "CP *148-49*" refers to the "Order Prohibiting Contact" filed by the resentencing court on March 27, 2009.

constitutional right to counsel at the resentencing when he was not provided counsel?

2. Appellant was found guilty by a jury of the second degree assault in June 2005. That conviction was affirmed on appeal, but remanded for resentencing. Did the trial court err at resentencing by entering a no-contact order that extends ten years from the date of resentencing rather than ten years from the date of the original sentencing?

B. STATEMENT OF THE CASE

As noted by this Court's unpublished opinion in State v. James Philip Douglas, Nos. 34451-3-II & 34461-1-II (consolidated) (Slip Op. filed September 8, 2008), the Pierce County Prosecutor charged appellant James P. Douglas with one count each of second degree assault, fourth degree assault and bail jumping under one cause number (04-1-03902-1), and one count each of first degree arson, residential burglary and violation of a domestic violence court order under another cause number (04-1-05086-5). The matters were joined for trial. CP 27, 34. On June 22, 2005, a jury convicted Douglas as charged, and sentences were imposed February 10, 2006. CP 18-22, 36, 135-47.²

² "CP . . . 135-47" refers to the three verdict forms from the first trial and the 10-page judgment and sentence entered on February 10, 2006, for the second degree assault and bail jumping convictions. A separate judgment

This Court reversed all of Douglas's convictions under the 04-1-05086-5 cause number, and affirmed all of the convictions under 04-1-03902-1. CP 27, 40, 49. A mandate remanding to the trial court was issued on October 14, 2008. CP 25.

The initial hearing following remand was held December 1, 2008, before the Honorable Thomas J. Feltnagle. 1RP.³ The prosecutor introduced the case as follows:

State of Washington versus James Philip Douglas; 04-1-05086-5. This case is remanded from the Court of Appeals following trial in 2005, where Ms. Sholin was the prosecutor. The Court reversed on . . . ineffective assistance of counsel.

[Defense attorney] Mr. McNeish was appointed to the case following that, and I understand that the defendant has a motion to represent himself. Mr. Decosta has agreed to stand in for Mr. McNeish, I believe, with the defendant's permission, so it is the defendant's motion, Your Honor.

1RP 3. The prosecutor also explained that the State planned to seek an aggravated exceptional sentence of at least 10 years incarceration for the arson conviction.. 1RP 4.

and sentence was entered for the fourth degree assault conviction. CP 18-22. The judgment and sentences for the arson, burglary and violation of court order convictions are not part of this record in this appeal, as they are filed under a separate cause number.

³ There are four volumes of verbatim report of proceedings for eight post-remand hearing date that are referenced as follows: 1RP - 12/1/08; 2RP -

The court engaged Douglas in an extended colloquy regarding his desire to represent himself at the retrial of the arson, burglary and violation of a court order charges, and granted his request. 1RP 5-16. But for a brief reference to Douglas's conviction for second degree assault which, like the pending arson charge, was a "strike offense", and to the fact he had already served his sentence for the assault conviction, there was no discussion of the resentencing required for Douglas's conviction under 04-1-03902-1. 1RP 15.

The next hearing was held December 16, 2009, before the Honorable Ronald E. Culpepper. 2RP. Once again, the case was introduced as "James Philip Douglas, Case 04-1-05086-5." 2RP 3. The initial discussion focused on several motions Douglas apparently filed in the 04-1-05086-5 matter and scheduling of the retrial in that matter. See 2RP 3-13.

One of Douglas's motions apparently involved a request to sever the 04-1-03902-1 proceedings from the 04-1-05086-5 proceedings. 2RP 12. The prosecutor agreed the matters should be severed and that a date for resentencing on the assault and bail jumping convictions should be set. 2RP 12-13. Douglas did not object to the setting of a resentencing date,

12/16/08; 3RP - 2/4, 6, 13 & 19/09 & 3/13/09 (combined in one volume);

but did note his desire to present testimony at that hearing in order to support a claim that his mental capacity was diminished at the time he committed the assaults. 2RP 13-14. Agreeing with the prosecutor that it was too late to assert a diminished capacity defense to the assault charges, the court denied Douglas's request for appointment of an expert to evaluate him. 2RP 14-15.

The court set January 12, 2009 for resentencing of the assault and bail jumping convictions. 2RP 17. There is, however, no record of a hearing being held January 12. Rather, the next hearing date is February 4, 2009, before the Honorable Susan K. Serko. At the outset of that hearing, the prosecutor referred to a scheduling hearing that took place on January 12. 3RP 3. The prosecutor also informed the court that "Mr. Douglas is pro se, Your Honor[,]" (3RP 3), and that

[t]here were two underlying actions; an assault action and an arson action. The assault action was affirmed, the arson cause of action was reversed for ineffective assistance of counsel. We are pending trial for the arson action. We probably do need to procedurally correct the J and S on the assault conviction, but we need time to go through and sort all of these out.

3RP 6.

and 4RP - 3/27/09.

Although not available in the superior court file for the 04-1-03902-1 cause, it appears Douglas filed a motion to vacate a judgment and sentence (there were two, CP 18-22, 138-47), previously entered in that cause. 3RP 8. Later during the February 4 hearing, the prosecutor noted that Douglas was specifically requesting a resentencing date for sometime in March. 3RP 11. A resentencing hearing was set for March 27, 2009, before the Honorable Bryan E. Chushcoff. 3RP 13-14.

At the next hearing, on February 6, 2009, there was a brief discussion about Douglas's desire to subpoena witnesses for the resentencing. 3RP 18-22. There was also mention of Douglas's motion to vacate the existing judgment and sentence in the 04-1-03902-1 matter, and the associated scheduling order. 3RP 23-29. Both Douglas and the court noted how "confusing" it was to keep separate the 04-1-03902-1 and 04-1-05086-5 cause numbers. 3RP 25.

At the next hearing on February 13, 2009, there was further discussion about what witnesses and issues were appropriate for Douglas to present at the resentencing hearing. 3RP 43-45, 52.

At the hearing on February 19, 2009, which was also introduced as a hearing regarding the 04-1-05086-5 cause number, 3RP 60, Douglas raised an issue regarding his pending motion to dismiss the 04-1-03902-1

convictions and his claim that he had not been provided appropriate copies of witness statements associated with that matter. 3RP 61-70. The court declined to rule on that issue, finding it more appropriate for consideration by the resentencing judge.,. 3RP 69-70.

At the same hearing, Douglas also complained about his inability to contact witnesses from jail for both the retrial and resentencing. He sought an order authorizing phone access for purposes of contacting witnesses. 3RP 71-75. Douglas's request was denied. 3RP 74-75.

The hearing on March 13, 2009, focused mainly on ascertaining what parts of discovery Douglas had yet to receive and effectuating his ability to subpoena witnesses without disclosing their addresses. 3RP 85-107.

A resentencing hearing was held in the 04-1-03902-1 cause number on March 27, 2009, before Judge Chushcoff. 4RP. The court also heard and summarily denied Douglas's motion to dismiss the cause altogether. 4RP 5-7.

The State recommended standard range sentences for the second degree assault and bail jumping convictions and a ten-year no contact order regarding the assault victims. 4RP 4, 25-26, 28-29. Douglas requested the court order various forms of counseling and vocational

education, and impose sentence for two fourth degree assaults instead of one second degree assault and one fourth degree assault. 4RP 29-30.

The court left the fourth degree assault sentence unchanged, noting that reversal of some of Douglas's conviction had no impact on the range for that offense. 4RP 31-32. The court imposed 12 months incarceration for the assault and a concurrent eight months for the bail jumping, with credit for time served. This meant Douglas had completed the incarceration portion of the sentences before resentencing. CP 124. The court also imposed 12 months of community custody for the second degree assault conviction. CP 125.

In addition to incarceration and community custody, the court, by separate order, directed Douglas to have no contact with Carroll Pederson or Pauline Pederson, the victims of the second and fourth degree assaults, for a period of ten years. CP 148-49. The "Order Prohibiting Contact" provided no specific expiration date. , The order instead specifies it shall remain in effect "until: . . . **Expires: Ten (10) years (Class B)** . . . or until modified or terminated by the court." CP 148. The court signed the order and it was filed on March 27, 2009. CP 148-49.

Douglas appeals. CP 132-33.

C. ARGUMENTS

1. DOUGLAS WAS DENIED HIS RIGHT TO COUNSEL AT RESENTENCING.⁴

Douglas had two related but distinct criminal matters in Pierce County Superior Court; the "assault action" (No. 04-1-03902-1) and the "arson action" (No. 04-1-05086-5). 3RP 6. These were joined for trial and consolidated for the initial appeal, but remained separate matters, and proceeded on separate tracks following remand from this Court. Douglas has not yet been retried in the "arson action," but has been resentenced in the "assault action." Assuming, arguendo, that Douglas made a knowing, voluntary and intelligent waiver of his right to counsel for purposes of the retrial in "arson action", no such waiver applied to resentencing on the "assault action." This Court should therefore reverse and remand for resentencing, which would give Douglas the choice of being represented by counsel or waiving counsel and proceeding pro se after a proper colloquy..

The state and federal constitutions guarantee criminal defendants reasonably effective representation by counsel at all critical stages of a

⁴ Although this issue was not raised below, it may be raised for the first time on appeal because it involves a manifest error affecting a constitutional right, i.e., the right to counsel. RAP 2.5(a)(3); State v.

case, including at resentencing following remand from an appeal. U.S. Const. amend. 6; Wash. Const. art. 1 § 22; Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Davenport, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007), review denied, 163 Wn.2d 1041, 187 P.3d 270 (2008).

A defendant also has the constitutional right to self-representation. 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 the right to counsel and the right to self-representation, 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, 153 Wn. App. 137, 175, 221 P.3d 928 (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).

Horton, 136 Wn. App. 29, 146 P.3d 1227 (2006), review denied, 162 Wn.2d 1014, 178 P.3d 1032 (2008).

Before granting a 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 self representation. City of Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984). The preferred way of making this finding is after a colloquy on the record that demonstrates the defendant understands 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. 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.

Prejudice will be presumed where counsel is absent from a critical stage. United States v. Cronin, 466 U.S. 648, 658-59, 659 n.25, 104 S. Ct. 2039, 80 L. Ed.2d 657 (1984); In re Davis, 152 Wn.2d 647, 673-74, 101 P.3d 1 (2004). Harmless error analysis under Strickland, which requires a showing of actual prejudice, is thus inapplicable. Davis at 673-74 (citing Cronin and Strickland). Structural defects in the trial mechanism, such as

the deprivation of counsel, defy harmless error analysis and require automatic reversal because they infect the entire process. Brecht v. Abrahamson, 507 U.S. 619, 629-630, 113 S. Ct. 1710, 123 L. Ed.2d 353 (1993); Penon v. Ohio, 488 U.S. 75, 88, 109 S. Ct. 346, 102 L. Ed.2d 300 (1988).

In Douglas's case, the only hearing following remand and before the resentencing that involved a waiver of right to counsel occurred on December 1, 2008, and was introduced by using only the "arson action" cause number. 1RP 3.⁵ More significantly, however, during the course of the colloquy regarding Douglas's request to proceed pro se:

1. Douglas made the request only in the context of the convictions this Court reversed, which were the "arson action" convictions. CP 27, 40, 49; 1RP 5-7;

2. The court's inquiry into Douglas's ability to represent himself focused exclusively on matters pertaining to the "arson action" charges and the retrial, but for one reference to the remaining second

⁵ To the extent it is significant, undersigned counsel, having reviewed the entire superior court file for Pierce County Cause No. 04-1-03902-1 through the date of June 24, 2009, notes that the only minute entry following remand from this Court is for March 27, 2009, the date of the resentencing.

degree assault conviction as a "strike" offense and mention that if reconvicted of the arson, Douglas would have another "strike." 1RP 8-15;

3. The prosecutor's involvement in the discussion focused solely on the retrial of the "arson action." 1RP 10-11, 14-15; and

4. Defense counsel's comments focused exclusively on the retrial in the "arson action." 1RP 14.

The record thus shows that at the December 1 hearing, neither counsel nor the court considered the resentencing required in the "assault action." In other words, there was no discussion regarding whether Douglas was making a knowing, voluntary and intelligent waiver of his right to counsel in that "critical stage" of the proceedings under Pierce County Cause No. 04-1-03902-1. The record also fails to establish Douglas was aware at the time of the December 1 hearing of the nature and classification of his remaining convictions, the maximum penalty he faced upon resentencing, or the existence of technical and procedural rules that would restrict what he could present or argue at the resentencing hearing. DeWeese, 117 Wn.2d at 378; Acrey, 103 Wn.2d at 211; Silva, 108 Wn.App. at 541. Moreover, the record of the resentencing hearing shows Douglas was under the mistaken impression he could pursue a diminished capacity defense to the assault conviction at resentencing, and

that the resentencing court had authority to unilaterally reduce the second degree assault conviction to fourth degree assault. 4RP 8, 30.

To summarize, Douglas never waived his right to counsel for resentencing, nor was he represented by counsel at resentencing. Deprivation of counsel without a proper waiver constitutes structural error for which no prejudice need be shown. This Court should therefore vacate Douglas's sentences entered under Pierce County Cause No. 04-1-03902-1 and remand for resentencing at which Douglas is provided effective representation of counsel. Brecht v. Abrahamson, 507 U.S. at 629-630.

2. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY WHEN IT IMPOSED A NO-CONTACT ORDER THE DURATION OF WHICH EXCEEDED THE MAXIMUM ALLOWED BY STATUTE.⁶

The trial court exceeded its statutory sentencing authority when it imposed a no-contact term that exceeds ten years from the date of the original sentencing. This Court should vacate the no-contact order and remand for entry of an order that does not exceed the statutory maximum term of ten years from the date of the original sentencing.

⁶ Douglas did not object to the provisions of the March 27, 2009 order prohibiting contact at the resentencing hearing. Illegal or erroneous sentences, however, may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

A trial court's sentencing authority is limited to that authority granted by statute. State v. Moen, 129 Wn.2d 535, 544-548, 919 P.2d 69 (1996) (citing State v. Paine, 69 Wn. App. 873, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993)). The applicable sentencing statutes are those in effect at the time the offense was committed. RCW 9.94A.345. Douglas's assaults were committed on July 25, 2004. CP 4-5.

A trial court's sentencing authority is generally set forth under Chapter 9.94A RCW (Sentencing Reform Act of 1981). The Legislature, however, also placed specific limits on a trial court's sentencing authority under Chapter 9A.20 RCW (Classification of Crimes). Under RCW 9A.20.021(1)(b), the maximum punishment for a Class B felony "shall" not exceed ten years confinement and a \$20,000 fine.

In addition to other terms and conditions,

As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

Former⁷ RCW 9.94A.505(8).

When a person is sentenced for a "crime against persons", such as second degree assault (former RCW 9.94A.411(2)), the court may include as conditions of the sentence those set forth in former RCW 9.94A.700(5).

Former RCW 9.94A.715(1), (2)(a). Former RCW 9.94A.700(5)(b) provides, "The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals[.]"

Second degree assault is a Class B felony, and therefore has a maximum allowable sentence of ten years. RCW 9A.36.021(2); 9A.20.021(1)(b). The no-contact period for a second degree assault conviction may thus not exceed ten years. See State v. Parsley, 73 Wn. App. 666, 669, 870 P.2d 1030 (1994) (conditions of sentence may not exceed statutory maximum); accord State v. Guerin, 63 Wn. App. 117, 121, 816 P.2d 1249 (1991), review denied 118 Wn.2d 1015 (1992).

The trial court originally sentenced Douglas on February 10, 2006. CP 138-47. At the March 27, 2009 resentencing hearing, however, the trial court entered an order prohibiting contact with the assault victims that does not appear to expire until March 27, 2019. CP 148-49. This order exceeds the trial court's sentencing authority because it imposes a condition of sentence that lasts more than ten years from the time Douglas began serving his sentence. RCW 9A.36.021(2); 9A.20.021(1)(b). The trial court therefore imposed an erroneous sentence and resentencing is required. Ford, 137 Wn.2d at 485.

⁷ All references to "Former" are to the post-July 1, 2004 version of the

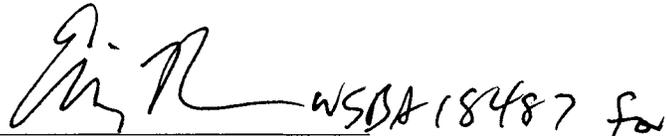
D. CONCLUSION

For the reasons stated herein, this Court should reverse Douglas's sentence and remand for resentencing.

DATED this 5th day of March, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "C. H. Gibson", followed by the handwritten text "WSBA 18487 for".

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statute.

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

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Respondent,)	
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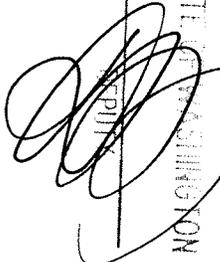
DECLARATION OF SERVICE

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 5TH DAY OF MARCH 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] KATHLEEN PROCTOR
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BY  STATE OF WASHINGTON
10 MAR -8 AM 9:44
FILED
COURT OF APPEALS
DIVISION TWO

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF MARCH 2010.

x 