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COURT OF APPEALS  
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STATE OF WASHINGTON

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**Nº. 39631-9-II**

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

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**In re: the detention of JOSEPH CARL TOWNSEND,  
Appellant.**

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**OPENING BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 07-2-09054-7  
The Honorable Susan K. Serko, Presiding Judge**

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**A. ASSIGNMENT OF ERROR**

The State presented insufficient evidence to establish Mr. Townsend was a sexually violent predator beyond a reasonable doubt where Dr. Goldberg's evaluation was based on four-year-old test results and incorrect information.

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Did the State present sufficient evidence to establish beyond a reasonable doubt that Mr. Townsend was a sexually violent predator where the testimony of the State's expert, Dr. Goldberg, was based on evaluations of Mr. Townsend performed four years before trial, speculation and conjecture, and on incorrect knowledge of Mr. Townsend's actions while incarcerated?

**C. STATEMENT OF THE CASE**

Factual and Procedural Background

On May 8, 1995, Mr. Townsend pled guilty to one count of first degree rape of a child. CP 1-2.

While incarcerated at Twin Rivers Correction Center, Mr. Townsend sought treatment and participated in the Sex Offender Treatment Program (SOTP). CP 59-74, RP 95. From July 15 through July 18, 2004, Mr. Townsend was evaluated for admission into the program. RP 96. At the time of his intake evaluation, Mr. Townsend regarded himself at high risk to reoffend and was concerned that, without treatment, he would act out impulsively, sexually, against a child in the future were he to be released. RP 110. The testing revealed that Mr. Townsend was not downplaying or minimizing the problems he was reporting, and also that Mr. Townsend was not over-

reporting or exaggerating his problems. RP 112-113.

Mr. Townsend reported that he had been sexually abused by his biological father when he was seven years old. RP 106. Mr. Townsend reported that he began masturbating at age seven and engaged in sexual contact with his then five year old sister which involved the two of them climbing on each other and touching each other while nude. RP 106. Mr. Townsend reported that his biological father had forced Mr. Townsend to perform oral sex on him, had ejaculated on Mr. Townsend, and had digitally penetrated Mr. Townsend's anus. RP 106.

Mr. Townsend reported that when he was thirteen years old he engaged in penile-vaginal intercourse with his then thirteen-year-old foster sister. RP 106. Mr. Townsend reported that when he was thirteen he also had sexual contact with a nine-year-old neighbor girl that involved touching her vagina, breasts, and buttocks as well as kissing her and having penile-vaginal intercourse with her. RP 106.

Mr. Townsend reported that when he was fifteen years old he was living with his aunt and he engaged in consensual penile-vaginal intercourse and cunnilingus with his then ten or eleven-year-old cousin. RP 106-107, 203. This contact stopped when he was discovered and sent to a juvenile treatment facility. RP 107.

Mr. Townsend reported that between the ages of seventeen and twenty-three he perpetrated sexual offenses against about 35 people

between the ages of three and fifteen, including one male. RP 107. Mr. Townsend reported that some of these people he knew and some of them were strangers, and that he sometimes committed offenses in public places. RP 107.

Mr. Townsend reported that he was married at the age of 19 but that he had five additional consenting female sexual partners at that time and that some of his sexual interactions with his wife were violent and coercive in nature. RP 107-108.

The intake examiner believed that Mr. Townsend was being truthful with her since Mr. Townsend was being so open about sharing information which could lead to difficulty for him. RP 109.

Mr. Townsend believed that his victims had been harmed by their experiences with him and they likely had psychological symptoms as a result of his actions. RP 117. At the time of the treatment intake testing, Mr. Townsend possessed conflicting emotions about his past behavior: he felt guilt and sadness and responsibility for what he had done, but also still possessed feelings of sexualizing some of his victims' behavior, felt good about his victims' experiences, and didn't feel devastated, helpless, sick, ashamed, or disgusted about what his victims experienced. RP 117.

At the time he was being tested for treatment, Mr. Townsend described himself as thinking about sex all day, having difficulty in

regulating his behavior, and engaging in behaviors that were sex-focused even in public places. RP 126. Mr. Townsend reported that he felt unable to control himself in public and that this was very distressing to him. RP 126. Mr. Townsend reported that his sexual preference was prepubescent females between the ages of eight and ten, but that he also was interested in an adolescent celebrity who was fourteen or fifteen years old. RP 127.

Mr. Townsend disclosed that he felt like he couldn't control himself, that he had fantasies about girls ranging in age from eight to adult, that he was having these fantasies at least once a day and that he was masturbating to them about once per week, and that his thoughts and behaviors were very distressing to him and he did not feel confident he could control his behavior at that point. RP 127. Mr. Townsend indicated that he knew it was wrong and that it scared him that he had done it in public places and he was worried he would do it again if he did not get treatment. RP 128.

Based on the results of the intake tests, it was recommended that Mr. Townsend would benefit from cognitive behavioral therapy in the SOTP program. RP 130.

From August to December of 2004, Dr. Edward Neiland, the primary treatment provider in the SOTP program, treated Mr. Townsend to help Mr. Townsend regulate his behavior. RP 153-154.

In December of 2004, Mr. Townsend formally began treatment with Dr. Neiland. RP 154. Dr. Neiland formally treated Mr. Townsend in the SOTP from December 2004 to September or October of 2005. RP 154. Dr. Neiland remembered Mr. Townsend for his honesty. RP 155-156. Mr. Townsend told Dr. Neiland that he believed he needed further treatment and would volunteer to be civilly committed. RP 155-156.

Over the course of his treatment with Dr. Neiland, Mr. Townsend gained concern, empathy, and remorse, and improved his ability to regulate his sexual behavior. RP 168. To Dr. Neiland, the largest indicator of Mr. Townsend's risk to reoffend was Mr. Townsend's own statements that he felt he was still a risk to reoffend and that he would likely reoffend were he to be released and have access to children. RP 168-169. The most significant improvements Mr. Townsend made during treatment was his ability to regulate his sexual behavior, his ability to control his deviant sexual fantasies, and his ability to resolve conflict without erupting in anger. RP 171. Dr. Neiland believed Mr. Townsend made significant gains and improvements during treatment and that Mr. Townsend wanted treatment. RP 172, 178.

In September 2005, Mr. Townsend was evaluated by Dr. Harry Goldberg, a forensic psychologist who specializes in sexually violent predators. RP 186, 195. Dr. Goldberg interviewed Mr. Townsend for

three hours at the Twin Rivers facility. RP 200. During this interview, Mr. Townsend was very open and honest about his alleged criminal history and sexual fantasies. RP 201. Dr. Goldberg interpreted this to mean that Mr. Townsend wanted to be civilly committed. RP 201.

Dr. Goldberg found that Mr. Townsend meets the Diagnostic and Statistics Manual IV (DSM-IV) definition of a pedophile. RP 207, 211. Dr. Goldberg found that Mr. Townsend had recurrent intense sexually arousing fantasies, urges, or behaviors involving sex with children for a period of the prior six months or more. RP 215. Mr. Townsend told Dr. Goldberg that his attraction to children caused him great distress and that he was very uncomfortable with those thoughts and feelings. RP 216-217. Mr. Townsend told Dr. Goldberg that couldn't control his impulses. RP 255.

Dr. Goldberg also diagnosed Mr. Townsend with polysubstance abuse, specifically abuse of alcohol, marijuana, and heroin. RP 257. Mr. Townsend told various evaluators that he was using those substances when he committed his offenses. RP 258. Dr. Goldberg also diagnosed Mr. Townsend as suffering from antisocial personality disorder. RP 259. It was Dr. Goldberg's opinion that Mr. Townsend's mental abnormalities and personality disorder caused him serious difficulty in controlling his sexually violent behavior. RP 265.

During the 2005 evaluation, Dr. Goldberg administered several

actuarial tests on Mr. Townsend, including the Static-99, the Static-2002, the Minnesota Sex Offender Screening Tool (MnSOST-R), and the Sex Offender Risk Appraisal Guide (SORAG). RP 271-272. Mr. Townsend's scores on all these actuarial instruments indicated he was at a high risk to reoffend. RP 283, 287, 293-294, 296-297.

Mr. Townsend's treatment in the SOTP program ended in the winter of 2005. RP 353. Two and one-half years later, Mr. Townsend was transferred to the Special Commitment Center (SCC). RP 353. Once Mr. Townsend ended his treatment in the SOTP, no treatment was available to him. RP 353. At the SCC, Mr. Townsend attended several therapy meetings, but stopped going because he felt he didn't need it anymore and that those issues were behind him. RP 309.

On June 15, 2007, the State of Washington filed a petition to have Mr. Townsend involuntarily civilly committed as a sexually violent predator. CP 1-2.

Mr. Townsend's SVP trial began before a jury on July 29, 2009. RP 91.

At trial, Dr. Goldberg testified that, in his opinion, Mr. Townsend suffers from a mental abnormality that makes it difficult for him to control his behavior and that, if not confined, Mr. Townsend is likely to engage in predatory acts of sexual violence. RP 321-322.

The found that the State had proved, beyond a reasonable doubt,

that Mr. Townsend was a sexually violent predator. CP 168.

Mr. Townsend filed timely notice of appeal on August 10, 2009.

CP 207.

#### **D. ARGUMENT**

Because Dr. Goldberg's expert opinion that Mr. Townsend was a sexually violent predator and was likely to engage in predatory acts of sexual violence if not confined was based on irrelevant four-year-old evaluations of Mr. Townsend, an incorrect knowledge of Mr. Townsend's history, and pure speculation, the State presented insufficient evidence to prove, beyond a reasonable doubt, that Mr. Townsend was a sexually violent predator likely to reoffend.<sup>1</sup>

To civilly commit a person under Washington's Sexually Violent Predator Act (RCW chapter 71.09), the State must prove beyond a reasonable doubt that the person is a sexually violent predator. RCW 71.09.060(1). A sexually violent predator is defined as: "[A]ny person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020. Thus, the State's burden in a sexually violent predatory civil commitment hearing is to demonstrate, beyond a reasonable doubt, that the

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<sup>1</sup> At the outset, it should be noted that this is not an attack on the credibility of Dr. Goldberg. Mr. Townsend acknowledges that the jury is the sole judge of witness credibility. *State v. Smith*, 31 Wn.App. 226, 228, 640 P.2d 25 (1982). Rather, even if this court were to deem Dr. Goldberg was 100% credible and view his testimony in the light most favorable to the State, Dr. Goldberg's testimony is still irrelevant to the issue before the jury, based on incorrect facts, and based on speculation and conjecture. Therefore, Dr. Goldberg's opinion was an insufficient to establish that Mr. Townsend was a sexually violent predator.

defendant suffers from a mental abnormality or personality disorder which makes that defendant likely to engage in predatory acts of sexual violence if not confined.

When appellate courts review the sufficiency of the evidence in sexually violent predator commitment proceedings, the evidence when viewed in the light most favorable to the State must be sufficient to allow a rational trier of fact to conclude that the person has serious difficulty controlling behavior and fits the criteria of a sexually violent predator. *In re Det. of Thorell*, 149 Wn.2d 724, 744-45, 72 P.3d 708 (2003), *cert. denied* 541 U.S. 990, 124 S.Ct. 2015, 158 L.Ed.2d 496 (2004). Separate proof of lack of control, however, is not required (*Thorell*, 149 Wn.2d at 738, 72 P.3d 708); an established link between the mental disorder and past sexual offense history is sufficient. *Thorell*, 149 Wn.2d at 736, 72 P.3d 708. In a sexually violent predator commitment proceeding, the jury must have sufficient evidence to find beyond a reasonable doubt:

- (1) That the respondent has been convicted of or charged with a crime of sexual violence; and
- (2) That the respondent suffers from a mental abnormality or personality disorder; and
- (3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence if not confined in a secure facility.

*Thorell*, 149 Wn.2d at 742, 72 P.3d 708.

The State's burden in a sexually violent predator civil commitment proceeding is to establish that the offender is a person who "*suffers* from a mental abnormality or personality disorder." RCW 71.09.020. Because the present tense of the word "suffer" was used by the legislature, the plain language of RCW 71.09.020 indicates that the legislature intended that only people who *currently* suffer *at the time of the commitment hearing* from a mental abnormality or personality disorder could be confined as sexually violent predators. Thus, the State's burden is to demonstrate that the defendant suffers from a mental abnormality or personality disorder on the date of the civil commitment hearing.

At the hearing, the State relied solely on the testimony of Dr. Goldberg to establish that, at the time of the hearing, Mr. Townsend suffered from a mental abnormality or personality disorder that made Mr. Townsend likely to engage in predatory acts of sexual violence if not confined in a secure facility.

Dr. Goldberg testified that, in his opinion, Mr. Townsend suffers from a mental abnormality that makes it difficult for him to control his behavior and that, if not confined, Mr. Townsend will more likely than not engage in predatory acts of sexual violence. RP 266, 321-322. Dr. Goldberg based his opinion that Mr. Townsend would reoffend on the four actuarial tests completed by Mr. Townsend in 2005 combined with

Dr. Goldberg's clinical judgment. RP 267-272, 395-396.

In 2005, Dr. Goldberg diagnosed Mr. Townsend as suffering from pedophilia and paraphilia not otherwise specified (nonconsensual sex) (RP 249-256) and antisocial personality disorder. RP 259. Dr. Goldberg testified that he believed Mr. Townsend continues to suffer from those mental disorders in 2009

However, as discussed below, even when Dr. Goldberg's testimony is viewed in the light most favorable to the State, Dr. Goldberg based his opinion on incorrect and out-of-date information rendering his opinion invalid as to the issue before the jury, and, even if the actuarial tests were deemed to be current and relevant, Dr. Goldberg's own testimony established that he couldn't prove Mr. Townsend was more likely than not to reoffend.

1. *Dr. Goldberg's opinion is insufficient to establish that Mr. Townsend currently presents a risk to reoffend if not confined where his opinion is based on evaluations conducted four years prior to trial and on speculation and conjecture.*

Dr. Goldberg administered the four actuarial tests to Mr. Townsend in 2005 and did not administer any further testing prior to Mr. Townsend's civil commitment hearing in 2009. The only research Dr. Goldberg performed to form his opinion about Mr. Townsend's likelihood of reoffending in 2009 was to review Mr. Townsend's records and spend one hour interviewing Mr. Townsend. RP 319. The

actuarial tests may have been a valid measure of Mr. Townsend's risk to reoffend at the time they were administered, but the tests were administered months before Mr. Townsend finished his SOTP therapy (RP 486) and almost four years prior to the time period relevant to the issue before the jury.

The State's evidence that the 2005 test results were still accurate diagnoses of Mr. Townsend's present condition consisted entirely of Dr. Goldberg's opinion. However, a review of Dr. Goldberg's statements about the diagnoses reveals that Dr. Goldberg's belief that the 2005 diagnoses were still accurate diagnoses was based not on fact or scientific principles, but on guess, speculation, or conjecture.

When asked during cross-examination what symptoms or signs Mr. Townsend was exhibiting which indicated that Mr. Townsend suffered from pedophilia in 2009, Dr. Goldberg responded,

[I]f you **just look at common sense**, you know, urges and behaviors do not disappear. They're chronic but they need to be managed. In 2005, [Mr. Townsend] said he had pervasive urges, fantasies about pedophilia and paraphilia, and now he's saying they've disappeared. **I just don't find that credible.**

RP 345 (Emphasis added).

Similarly, during direct examination, Dr. Goldberg was asked how he could form the opinion that Mr. Townsend still suffered from paraphilia not otherwise specified with regard to non-consensual sex. RP 256. Dr. Goldberg responded, "we must **assume** that it's still there,

we must **infer** that it's still there.” RP 256 (emphasis added). Dr. Goldberg held these opinions despite the fact that Mr. Townsend successfully completed treatment in the SOTP (RP 351-352) and declined treatment at the SCC because he felt “he’s been through it, he’s done it, he’s resolved those issues, he doesn’t have those issues anymore.” RP 353-354.

Dr. Goldberg’s expert opinion is based on presumption and speculation and not on any current scientific testing or evaluation demonstrating that Mr. Townsend currently suffers from mental abnormality or personality disorder. Dr. Goldberg completely ignores Mr. Townsend’s statements in the 2009 interview that he had not had any sexually deviant thoughts since completing treatment in 2005 and felt that he had control and did not need any more treatment. RP 320. The logical conclusion to be drawn from the State’s evidence is that Mr. Townsend completed his treatment in the SOTP in 2005 and has no further need for treatment and no longer needs to be confined.

As discussed above, the State’s burden was to establish Mr. Townsend’s risk to reoffend ***at the time of the hearing***, not four years prior. Accordingly, the results of the actuarial tests were simply irrelevant as to whether or not Mr. Townsend presented a risk of reoffending at the time of the hearing. This renders Dr. Goldberg’s opinion of Mr. Townsend’s likelihood to reoffend similarly irrelevant

since it is based on outdated information which is not probative of Mr. Townsend's likelihood of reoffending at the time of the hearing.

The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972). However, as his testimony makes clear, Dr. Goldberg bases his opinion that Mr. Townsend currently suffers from pedophilia and paraphilia not otherwise specified entirely on guess, speculation, conjecture, presumption, and "common sense." RP 256, 345.

Thus, Dr. Goldberg's opinion is insufficient to establish that, at the time of the civil commitment hearing, Mr. Townsend was more likely that not to reoffend since it is based on information four years out of date and upon guess, speculation, and conjecture.

2. *Dr. Goldberg's opinion is insufficient to establish that Mr. Townsend currently presents a risk to reoffend if not confined where his opinion is based on an inaccurate understanding of Mr. Townsend's actions which at the SCC.*

At numerous points during his testimony, Dr. Goldberg referred to the "facts" that Mr. Townsend was "still using drugs" and had continued his violent behavior while incarcerated and at the SCC meant that Mr. Townsend was likely to reoffend. RP 221, 286, 395-396. However, the evidence introduced at trial established that these events either weren't confirmed or that Mr. Townsend had not, in fact,

engaged in them.

Dr. Goldberg's belief that Mr. Townsend had used marijuana while at the SCC was based on Mr. Townsend failing a drug screen. RP 348-349. However, at trial Dr. Goldberg acknowledged that false positive results are possible and that no follow-up test was performed to verify that Mr. Townsend had, in fact, consumed marijuana. RP 348-350.

Dr. Goldberg's belief that Mr. Townsend had engaged in violent behavior while at the SCC was based on Dr. Goldberg's belief that Mr. Townsend had been involved in several fights and several verbal altercations. RP 369. However, the facts introduced at the trial established that Mr. Townsend actually walked away from the first fight and the second was investigated and it was determined that Mr. Townsend had actually been defending himself and had been cleared of any wrongdoing in that situation. RP 370, 472-473.

Similarly, Dr. Goldberg's belief that Mr. Townsend had been involved with verbal altercations was based on one incident which occurred just after Mr. Townsend had been sent to prison in 1995 and one incident which occurred in March, 2008. RP 488. The first incident involved Mr. Townsend swearing at the jail staff and quitting his job in the kitchen. RP 488. The incident in the jail occurred long before Mr. Townsend received any treatment. RP 488. The second

alleged verbal altercation occurred when Mr. Townsend was standing with a group of other patients at Western State Hospital who were feeding some ducks on the grounds. RP 489-490. Security staff asked the inmates to stop feeding the geese and Mr. Townsend was accused of swearing at the guards and telling them they couldn't tell Mr. Townsend what to do. RP 489. However, at the hearing regarding the incident, it was determined that Mr. Townsend had not said anything and the charge against Mr. Townsend was dropped and Mr. Townsend was cleared of any wrongdoing. RP 489-490.

Thus, in forming his opinion that, at the time of the hearing, Mr. Townsend was more likely than not to reoffend if not confined, Dr. Goldberg was relying on his mistaken and unsupported beliefs that Mr. Townsend had continued to use drugs while at the SCC and had been involved in several fights and verbal altercations. The actual facts were that Mr. Townsend had been cleared of any wrongdoing in all situations save the first, which occurred prior to Mr. Townsend receiving any treatment. Therefore, Dr. Goldberg's opinion is invalid since it is founded on an erroneous understanding of the facts of Mr. Townsend's case.

3. *Dr. Goldberg's opinion is insufficient to establish that Mr. Townsend will more likely than not reoffend if not confined where Dr. Goldberg's testimony establishes that, even if the actuarial tests accurately predicted the likelihood Mr. Townsend would reoffend at the time of the*

*hearing, and, even if Dr. Goldberg had a proper understanding of the facts of Mr. Townsend's case, Mr. Townsend still had less than a 51% chance of reoffending and any clinical judgment putting the likelihood above 51% would be "no better than a crap shoot."*

As stated above, Dr. Goldberg based his opinion that Mr. Townsend would reoffend on the four actuarial tests completed by Mr. Townsend in 2005 combined with Dr. Goldberg's clinical judgment. RP 267-272, 395-396. However, also as stated above, the actuarial tests were irrelevant to the issue of whether or not Mr. Townsend was more likely than not to reoffend at the time of the hearing and Dr. Goldberg's clinical judgment was based on a misunderstanding of the facts of Mr. Townsend's case. However, even assuming the actuarial tests applied and Dr. Goldberg had an accurate grasp of the facts of Mr. Townsend's case, Dr. Goldberg's own testimony establishes that Mr. Townsend cannot be said to have been more likely than not to reoffend beyond a reasonable doubt.

First, Dr. Goldberg testified that he could not measure completely the percentage that Mr. Townsend was likely to reoffend. RP 347.

Second, only one actuarial test, the SORAG, consistently put Mr. Townsend at a greater than 50% chance of reoffending. RP 297, 395. The SORAG put Mr. Townsend at a 58% chance of reoffending in seven years and an 80% chance of offending in ten years. RP 294.

However, the Static-99 put Mr. Townsend at a 30% chance of reoffending in five years, a 38% chance of reoffending in ten years, and a 40% chance of reoffending in fifteen years. CP 5-49. The Static-2002 put Mr. Townsend at a 23.6-40.8% chance of reoffending in the next ten years. RP 273-286. Finally, the MnSOST-R put Mr. Townsend at a 30-57% risk of reoffending in six years. RP 294.

Thus, the majority of the actuarial test results put Mr. Townsend at a risk of reoffending much lower than the 51% “more likely than not” standard required to civilly commit him as a sexually violent predator.

Third, in order to reach his conclusion that Mr. Townsend was more likely than not to reoffend, Dr. Goldberg relied on his clinical judgment. RP 395-396. However, at trial, Dr. Goldberg testified that the actuarial tests had been developed to remove clinical judgment from the determination of the likelihood of reoffense because clinical judgment was “no better than a crap shoot.” RP 396.

Thus, even if they are considered to be relevant to Mr. Townsend’s current likelihood of reoffending, the bulk of the actuarial tests put Mr. Townsend at less than a 51% chance of reoffending. Further, Dr. Goldberg’s own testimony established that his clinical judgment that Mr. Townsend was more likely to re-offend than not was “no better than a crap shoot.” Thus, even assuming all the State’s

evidence is true, and drawing all reasonable inferences in the light most favorable to the State, the State's evidence is insufficient to establish that Mr. Townsend is more likely than not to re-offend.

**E. CONCLUSION**

For the reasons stated above, this court should vacate the order civilly committing Mr. Townsend and remand for his immediate release.

DATED this 4<sup>th</sup> day of May, 2010.

Respectfully submitted,



Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on May 4, 2010, she delivered by United States mail to Joshua Choate, Office of the Washington State Attorney, 800 5<sup>th</sup> Avenue, Suite 2000, Seattle, Washington 98104, and Joseph C. Townsend, Special Commitment Center, McNeil Island Corrections Center, Post Office Box 88600, Steilacoom, Washington 98388, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury. Signed at Tacoma, Washington on May 4, 2010.

  
Norma Kinter

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