

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

NO. 39752-8-II

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

AMY SCHORNO,

Appellant,

v.

KEVIN KANNADA et al.,

Respondents.

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

The Honorable Linda CJ Lee, Judge

BRIEF OF APPELLANT

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WASHINGTON CASES

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WASHINGTON CASES (cont'd)

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State v. Harvill,
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State v. Heming,
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review denied, 153 Wn.2d 1009 (2005) 36

State v. McKnight,
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State v. Riker,
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State v. T.J.M.,
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State v. Weisberg,
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State v. Williams,
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TABLE OF AUTHORITIES (cont'd)

STATUTES AND OTHER AUTHORITIES

11 Wash. Practice,
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Anderson, M.J., *Reviving Resistance in Rape Law*,
1998 U. ILL. L. REV. 953 (1998) 30

Black's Law Dictionary (4th ed. rev. 1968) 24

Edwards, D., *Comment: Acquaintance Rape & the
"Force" Element: When "No" Is Not Enough*,
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Spohn, C., "The Rape Reform Movement: The
Traditional Common Law and Rape Law Reforms,"
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by concluding that if a teenaged boy sexually assaults an adult woman, her only defense to a civil claim for child sex abuse is the affirmative defense of duress.

2. The trial court erred by granting summary judgment for the defendant/cross-claimant when there are material issues of fact of who was the perpetrator and who the victim of sexual assault.

Issues Pertaining to Assignments of Error

1. Does the law require an adult woman to physically resist a sexual assault by a fully grown teenager, larger and stronger than she is, to the point of risking immediate death or immediate grievous bodily injury, or be held strictly liable for child sexual abuse?

2. If a 14-year-old male imposes sexual intercourse on an adult woman when she has clearly expressed her lack of consent, i.e., he perpetrates rape in the third degree, RCW 9A.44.060, is she civilly liable as a matter of law for "child sexual abuse" if he sues for damages from the experience?

3. If a 14-year-old male imposes sexual contact or intercourse on an adult woman against

her clearly expressed lack of consent, is she a "perpetrator" for purposes of RCW 9A.44.079 defining rape of a child in the third degree, or RCW 9A.44.089 defining child molestation in the third degree?

4. On a motion for summary judgment where the court must view the evidence in the light most favorable to the nonmoving party, was there sufficient evidence to present a factual issue for the jury of who was the perpetrator and who the victim?

B. STATEMENT OF THE CASE

1. BACKGROUND

In December, 2005, the court granted Amy Schorno, a married adult woman and mother of three children, a protection order against Kevin Kannada. The court granted protection based on allegations that Kevin Kannada had abused and assaulted Ms. Schorno over a period of years and now was threatening her 13-year-old daughter. CP 2-3, 141.

By seeking this protection order, Ms. Schorno hoped to end a long nightmare. Mr. Kannada had begun forcing himself on Ms. Schorno when he was

14. For four and one-half years, Kevin sexually and physically assaulted Amy Schorno.

... Kevin hit me, he choked me, he threatened to kill me, my husband, our family dog. Kevin knocked me to the ground more than once. He sat on my chest while threatening to punch me in the face. He hit me in the face with a telephone in his hand and broke my nose. It is bent to this day. He bruised me all over my body, especially my bottom so I couldn't undress in front of my husband. He grabbed my wrists and collarbone, repeatedly telling me how easy he could break them.

CP 141.

The sexual contact began when Kevin followed Amy into her garage in late 2000. She reached into the car to get something. When she turned around, Kevin was right in her face and kissed her. Amy pushed him back and told him to stop it. She told him he could not do that. She said no. He apologized. Amy told him she would tell Dan what he did. Kevin told her if she told, he would tell Dan that Amy had kissed him, and Dan would believe him because people believe the kid. CP 81-82. He

threatened that Amy would lose her children, just like Mary Kay Letourneau.¹ CP 136-37.

Dan Schorno was an insanely jealous man.² Amy knew Dan would believe Kevin, would destroy her family, and would take her children. CP 87-88.

Kevin forced Amy to masturbate him two or three times before the end of 2000. CP 90. He exposed himself and told her to touch him, but she refused. He responded, "You know you're going to. You know you're going to do it anyway." Then he physically took her hand and put it on his penis. CP 77-78.

¹ State v. Letourneau, 100 Wn. App. 424, 997 P.2d 436 (2000). In late 2000, Mary Kay Letourneau was very much in the news. In 1997 at age 35, she was arrested in King County, Washington, for a sexual relationship with a 13-year-old student. Her husband reported her to the police, and in 1999 filed for divorce and custody of their children, which he was granted. She served several years in prison. See, e.g., Wikipedia (http://en.wikipedia.org/wiki/Mary_Kay_Letourneau) (last visited 12/28/2010).

² Dan accused Amy of having liaisons with television personalities. He was particularly afraid she was attracted to men of color; he considered Steve Pool (a television weatherman) and Marques Tuiasopu (a football player) threats. Dan liked Amy to dress up when he took her out for dinner. But if the waiter smiled at Amy or made eye contact with her, Dan would punish her all night. CP 136; CP 82-83.

Amy was afraid of Kevin, of his threats, and of what he would do if she physically fought back. Indeed, when Amy physically resisted Kevin's behavior, he escalated to overt violence and violent threats in early 2001. By then he had forced her to have sexual intercourse³ against her will. CP 93.

By disclosing the abuse she had endured, Amy Schorno suffered precisely the consequences Kevin Kannada had long threatened: Dan Schorno sought custody of their children, accusing Amy of being unfit. CP 138. Dan also agreed to assist Kevin Kannada in his civil law suit against Amy Schorno for child sexual abuse. CP 106.

For the family court, Ms. Schorno underwent a psychosexual evaluation. CP 138. The evaluator concluded she has a normal profile with no signs of pathology or sexual deviancy. CP 172-82.

She does not have the type of psychological profile that one would expect to see in a sexually abusive person. Her reports of being physically

³ "Sexual intercourse" "has its ordinary meaning" and also means any penetration of the vagina or anus with any object, and any act of sexual contact between the sex organs of one person and the mouth or anus of another. RCW 9A.44.010(1).

injured, threatened, and coerced by Kevin Kannada into submitting to the sexual acts she reports he committed against her are consistent with the examinations results obtained in her psycho-sexual evaluation.

CP 172-73. The full evaluation concluded:

Ms. Schorno may have been sexual with an adolescent male but it appears to be coerced sexual involvement by Kevin Kannada.

CP 182. The family court awarded Amy Schorno custody of her children. CP 106.

2. CLAIMS AND COUNTERCLAIMS

Kevin Kannada and his parents hired counsel and demanded \$500,000 from Amy Schorno and her husband, alleging damages for "child sexual abuse" he claimed began when he was 14 and continued until he was over 18. Instead of submitting to further threats, Amy Schorno filed suit against Kevin Kannada and his parents for damages for his sexual assaults, violence, and mental abuse of her. CP 1-7.

Kevin Kannada and his parents counterclaimed for damages from Ms. Schorno's child sexual abuse of Kevin. CP 14-15, 41-42.⁴

3. PRETRIAL DISCOVERY

In contrast to Amy Schorno's psychosexual evaluation, an independent medical evaluation of Kevin Kannada determined that he was "very dishonest" with the examiner regarding his general background information. Contrary to the assertion that Kevin Kannada was "deprived of his mental capacity" while engaging in sexual contact with Amy Schorno, the psychologist found he was

a wilful adolescent making many critical life decisions in defiance of his parents, and with full knowledge of the disapproval he would receive if they knew what he was doing.

CP 156-57. Dr. Gollogly found Kevin Kannada scored very high on a test for psychopathy. CP 156-59.

His score indicates that he scores positive on many psychopathic traits. I have worked with individuals who were sex offenders or criminals who had psychopathic traits, and Kevin Kannada fits this profile. This is extremely

⁴ They also claimed the torts of outrage, malicious interference with parent-child relationship, defamation, and negligent supervision. CP 14-15, 41-42. For purposes of this appeal, only the child sexual abuse is relevant.

significant in trying to sort out the likely interaction between him and Amy Schorno.

7. One can reasonably infer from Kevin Kannada's psychological profile, and Amy Schorno's psychological profile ... that Kevin Kannada could have exploited Amy Schorno in just the way Amy Schorno has described. He would not feel empathy for the pain he was causing her, or the injury his behavior was causing others. He would see her as a vulnerable person easily victimized, and he would gain pleasure from the control he imposed upon her, and the devastating effect it had on her emotional state.

CP 158-59. Dr. Gollogly concluded:

I am of the opinion that given Kevin Kannada's personality, even at age[] 14, he was far more likely to be the aggressive person, in charge of the interaction, and deriving pleasure from asserting and maintaining control, than was Amy Schorno.

CP 159.

The Kannadas' counsel took Amy Schorno's deposition. Believing the only possible legal defense to childhood sexual abuse was statutory duress, counsel's questions were directed to sexual contact and threats of violence. CP 43-45.

From the beginning of the deposition, Amy clarified her concern over counsel's phrasing of questions about sexual intercourse or contact.

A. I'm referring to the way you're phrasing it as if it was consensual, and it was not.

CP 72. Counsel accepted Amy's disagreement on who committed the acts:

Q. Where did you have sex? Where did you have sexual intercourse?

A. When did he force me to have sexual intercourse?

Q. Where did you have sexual intercourse? Yes.

CP 74. Amy consistently corrected counsel on the point of who was the perpetrator.

Q. Had you kissed him by then?

A. I didn't kiss him.

Q. You never kissed him?

A. He kissed me.

CP 79.

Amy used the word "assault" instead of "rape," because she thought the word "rape" was too hard -- she just did not use the word. CP 96. Nonetheless, she described what occurred to her.

Q. So shortly after the first time you had sex in 2001, he threatened acts of violence?

A. Shortly after he assaulted me in 2001 is when he started grabbing me and pushing me and threatening to break my bones and those things. ... And hitting me and putting his hands around my throat.

CP 97.

4. SUMMARY JUDGMENT ON ISSUE OF CHILDHOOD SEXUAL ABUSE

Prior to trial, Kevin Kannada sought partial summary judgment on the issue of liability for

childhood sexual abuse. CP 43-67. The motion claimed the only legal defense to the claim of childhood sexual abuse was duress: i.e., reasonable fear of "immediate death or grievous bodily injury." CP 52-53; RP(10/2/09) 28-31, 37-40.

Amy Schorno responded with declarations that every sexual contact was committed by Kevin without her consent, and that she had expressed her lack of consent to Kevin Kannada. CP 102-07, 136-55.

I never consented to any sexual contact at any time with Kevin Kannada. He was the aggressor, and his aggression included physical force from the beginning. He was full grown and bigger than me when he was only 14 years old. He began this long and escalating series of abusive behaviors with a kiss, forced upon me in my garage. That kiss was unwanted, and imposed upon me by force. I told him to stop, and threatened to tell my husband. Kevin said if I did he would say that I had kissed him, and would make me out to be a child molester.

CP 136.

I may be uncertain of exact dates, and I may be uncertain of the exact sequence of events, but I am not at all uncertain regarding the lack of consent on my part. I never gave my consent to Kevin Kannada to kiss or fondle me, or make me masturbate him, or do all the other things he wanted to do, and did do to me. I was coerced. The level of coercion

rose as the level of abuse rose, and very quickly, I had lost control of my life.

CP 137.

In regards to the first time that Kevin made me masturbate him, Defendants left out page 19 lines 22-23, where I say "he told me to touch him, and **I said no.**" and that I didn't willingly reach to touch Kevin Kannada. Page 19 line 25 states that while I was driving he exposed himself, took my hand off the steering wheel, and put my hand on him.

CP 139. Amy Schorno acknowledged that she masturbated Kevin until they reached his house and she could get him out of the car. CP 77-778.

From the first time Kevin forced a kiss on Amy, when she immediately said no, he immediately threatened her. CP 139, 86.

Amy testified that Kevin assaulted her when he was 14, 15, 16, and 17. She never initiated any sexual contact with him. CP 140.

I was afraid of Kevin Kannada from the first time he forced a kiss upon me. Kevin was taller, heavier and stronger than me. As I later came to know he has a high tolerance for pain and seems to enjoy being hurt. Almost immediately after the first unwanted kiss, he would follow me into rooms of my house and fondle or kiss me. I was afraid of Kevin before he physically hit me After he forced kisses on me, but before he raped, forced me to masturbate him, struck me or verbally threatened to, he would follow me into rooms (the laundry room, garage, etc...) fondle me, even

though I would tell him no, and push him away. He would block the door keeping me from escaping until he had done what he wanted. He was bigger and stronger, I had no say, and I was afraid of him.

CP 140.

It seems that the defense thinks that I have to physically fight off Kevin in order to say that I did not want to be raped, fondled, kissed, and controlled. I said "no" very clearly, and repeatedly, when the abuse began

CP 141.

As counsel urged the court:

It's going to be a question of fact for this jury to decide who committed the act, and Amy Schorno is not required to show that she was being -- that she was going to be killed when she did not fight to her death.

RP(10/2/09) at 36.

The trial court granted Kevin Kannada's motion. RP(10/2/09) at 40-42. CP 207-08.

Amy Schorno moved for reconsideration, CP 209-64, which the trial court denied. CP 280-81.

Amy Schorno sought interlocutory discretionary review on this issue, among others. This Court granted discretionary review of this single issue.

C. ARGUMENT

1. SUMMARY OF ARGUMENT

The statutes defining child sexual abuse and rape in the third degree require a factual determination of who was the perpetrator and who the victim. The law does not require a woman facing sexual assault to physically resist in order to be a victim of rape.

A teenaged boy is capable of committing the crimes of rape in the third degree, indecent liberties by forcible compulsion, and simple assault with sexual motivation against an adult. If the minor is indeed the perpetrator of these crimes and the adult the victim, the adult cannot be civilly liable for "child sexual abuse" from these acts.

The evidence in this case presents conflicting versions of events. The adult claims the teenager sexually assaulted her when she was afraid of him and clearly expressed her lack of consent. The teenager relies on a legal determination that he was not old enough to "consent" and claims the adult is "strictly liable" for any sexual contact.

Being a perpetrator is far different from giving "consent." The factual issue of who was the perpetrator of the sexual contact precludes summary judgment finding child sexual abuse occurred.

2. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

a. Issue of Material Fact

A court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court. Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

The appellate court considers the facts and all reasonable inferences from those facts in the light most favorable to the non-moving party -- here, Amy Schorno. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

In this case, the trial court improperly granted partial summary judgment when there was a major issue of material fact: whether Amy Schorno or Kevin Kannada was the "perpetrator" or "victim" of the acts that occurred.

b. Interpretation of Statute

The interpretation of a statute is an issue of law that is appropriate for disposition on summary judgment. Castro v. Stanwood Sch. Dist. No. 401, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). This Court reviews the trial court's interpretation of a statute de novo. Id.

The trial court improperly interpreted the statutes at issue.⁵ It assumed an adult was the "perpetrator" and a 14-year-old was the "victim," and that the adult was therefore strictly liable for any sexual contact. This interpretation disregarded the crimes Amy Schorno alleged Kevin Kannada committed against her.

The court's holding ultimately concludes that a person under the age of 16 cannot commit the crimes of rape in the second degree, rape in the third degree, indecent liberties, or assault with sexual motivation, against an adult.

⁵ The trial court did not elaborate on the reasoning behind its decision. "I am granting the motion for summary judgment that was brought before this Court." RP(10/2/09) at 42; CP 207-08. Appellant therefore refers to the grounds stated and arguments made by the moving party. RP(10/2/09) at 28-31, 37-40; CP 43-67, 183-204.

3. THE TRIAL COURT'S RULING DISREGARDS THE FACTUAL QUESTION OF WHO WAS THE PERPETRATOR AND WHO WAS THE VICTIM.

This case presents an unusual scenario where both parties seek damages from the other for having "perpetrated" acts against them that are violations of criminal statutes. The claims arise from the same interactions, but viewed through different eyes, they reveal the competing statutes and public policies involved.

a. Kevin Kannada's Claims

A civil claim for "child sexual abuse" can be brought for damages experienced from

any act *committed by* the defendant against a complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 9A.44 RCW or RCW 9.68A.040 or prior laws of similar effect at the time the act was committed.

RCW 4.16.340(5) (emphasis added). "The statute unambiguously applies to children as well as adult defendants." Buschmann v. Kennaugh, 144 Wn. App. 776, 781, 183 P.3d 1124 (2008), review denied, 165 Wn.2d 1020 (2009).

Kevin Kannada's claims against Amy Schorno allege acts that violated RCW 9A.44.079 and RCW 9A.44.089 when he was under age 16.⁶ CP 56.

9A.44.079. Rape of a child in the third degree

(1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to *the perpetrator* and *the perpetrator* is at least forty-eight months older than *the victim*.

9A.44.089. Child molestation in the third degree

(1) A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to *the perpetrator* and *the perpetrator* is at least forty-eight months older than *the victim*.

(Italic emphases added.)

Contrary to Kevin Kannada's arguments, these statutes do not make any "person" involved in the sexual contact or intercourse guilty; they only

⁶ Kevin Kannada later added allegations of RCW 9A.44.050 (rape in the second degree) for acts that occurred after he was 16, based on claims that he had a "diminished capacity" to consent, and so was "mentally incapacitated." CP 39-42. The summary judgment was limited to acts when he was 14, so those claims are not relevant to the issues in this appeal.

implicate the "perpetrator" of the sexual contact or intercourse. Kannada and the court both overlooked this distinction. CP 56.

Kannada claimed the only possible legal defense to child sexual abuse is duress.

9A.16.060. Duress

(1) In any prosecution for a crime, it is a defense that:

(a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and

(b) That such apprehension was reasonable upon the part of the actor; and

(c) That the actor would not have participated in the crime except for the duress involved.

...

CP 55-60.

Contrary to Kevin Kannada's assertions and the trial court's holding, this case does not involve a claim of duress.

[A] defense of duress *admits* that the defendant committed the unlawful act, but pleads an excuse for doing so. ... The duress defense, unlike self-defense or alibi, does not negate an element of an offense, but pardons the conduct even though it violates the literal language of the law.

State v. Riker, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994) (claiming duress for delivery of drugs); State v. Harvill, 169 Wn.2d 254, 234 P.3d 1166 (2010) (same).

Amy Schorno does not admit she committed an unlawful act and plead an excuse. She denies she committed the unlawful act: she denies she was a "perpetrator" of any sexual abuse. If she was the victim of the sexual assault, by definition she was not the "perpetrator." Of course, since she was over the age of 16, she could not be the "victim" of child molestation or child rape. But merely being under the age of 16 does not automatically make Kevin Kannada a "victim" of a crime -- especially if he perpetrated the contact of which he now complains.

b. Amy Schorno's Claims

Amy Schorno's claims against Kevin Kannada allege acts that violate the following statutes:

9A.36.021. Assault in the second degree

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

...
(e) With intent to commit a felony, assaults another; ...

9A.36.041. Assault in the fourth degree

(1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

"Assault" is defined by common law to include an unlawful touching or actual battery.

An assault is an intentional touching ... of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching ... is offensive if the touching ... would offend an ordinary person who is not unduly sensitive.

11 Wash. Practice, Wash. Pattern Jury Instructions: Criminal (WPIC) 35.50 (2008), approved in State v. Elmi, 166 Wn.2d 209, 216 n.3, 207 P.3d 439 (2009).

The Legislature acknowledges juveniles commit crimes with sexual motivation.

13.40.135. Sexual motivation special allegation -- Procedures

(1) The prosecuting attorney shall file a special allegation of sexual motivation in every juvenile offense other than sex offenses as defined in RCW 9.94A.030 when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably consistent defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder.

...

9.94A.030. Definitions

...

(43) "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

...

9A.44.100. Indecent liberties

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

(a) By forcible compulsion

9A.44.050. Rape in the second degree

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion

9A.44.060. Rape in the third degree

(1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person not married to *the perpetrator*:

(a) Where *the victim* did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with *the perpetrator* and such lack of consent was clearly expressed by *the victim's* words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of *the victim*.

9A.44.010. Definitions

...

(6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of

death or physical injury to herself or himself or another person

(7) "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

Like the crimes of rape of a child and child molestation, the crimes of rape 2° and rape 3° do not have a mens rea element requiring proof of intent. State v. Chhom, 128 Wn.2d 739, 741 n.4, 911 P.2d 1014 (1996).

"Consent" to the sexual act is a valid affirmative defense to the element of "forcible compulsion." Thus if the complainant provides "actual words or conduct indicating freely given agreement" to the sexual activity, that consent disproves forcible compulsion. The person accused has the burden to prove the accuser consented to the act. State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989); State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006). Thus Kevin Kannada has the burden of proving that Amy Schorno consented, i.e., that she freely said "yes."

"Forcible compulsion" does not require showing the victim physically resisted. It is force "**used or threatened to overcome or prevent resistance** by

the female." State v. McKnight, 54 Wn. App. 521, 527, 774 P.2d 532 (1989) (emphases added); State v. Atkins, 130 Wn. App. 395, 400, 123 P.3d 126 (2005).

These statutory definitions reveal a spectrum of human behavior with different legal consequences.

If an adult willingly initiates the sexual contact with a minor, the minor's "consent" does not negate the adult's crime.

If a minor initiates sexual contact and an adult willingly participates, the minor's initiation does not negate the adult's crime.

If an adult fails to clearly express "consent," i.e., does not say "yes" to the minor's advances, that failure to say "yes" may not be enough to negate the adult's crime.

However, if the minor has used forcible compulsion and the adult has not said "yes," the minor is the perpetrator and the adult is the victim.

And if an adult clearly expresses her "lack of consent" and a minor nonetheless commits the act, again the minor has committed a crime, not the

adult. The minor is the perpetrator and the adult is the victim.

c. Perpetrator & Victim

The statutes for rape of a child, child molestation, and rape 3° clearly require determining who was "the perpetrator" of the sexual contact or sexual intercourse, and who "the victim." The statutes do not separately define the terms. When a statutory term is undefined, the court may look to a dictionary to give the word its ordinary meaning. State v. Gonzalez, 168 Wn.2d 256, 263-64, 226 P.3d 131 (2010).

PERPETRATOR. Generally, this term denotes the person who actually commits a crime or delict,⁷ or by whose immediate agency it occurs.

Black's Law Dictionary at 1298 (4th ed. rev. 1968).

See also Nevada Revised Statutes § 200.364:

1. "Perpetrator" means a person who commits a sexual assault.

...

4. "Victim" means a person who is subjected to a sexual assault.

⁷ **"DELICT.** In the Roman and civil law. A wrong or injury; an offense; a violation of public or private duty." Black's Law Dictionary at 514 (4th ed. rev. 1968).

Certainly "perpetrator" carries a stronger connotation than merely "defendant," "person," or "accused."

When the Legislature enacted the child molestation and rape of child statutes, it intentionally chose the terms "perpetrator" and "victim" over the statutory rape language of "persons" "engaging" in sexual intercourse. Former RCW 9A.44.070 provided:

(1) A person over thirteen years of age is guilty of statutory rape in the first degree when the **person engages in** sexual intercourse with **another person** who is less than eleven years old.

See State v. Abbott, 45 Wn. App. 330, 726 P.2d 988 (1986), review denied, 107 Wn.2d 1027 (1987), discussed below.

"Legislative changes can also be considered when determining legislative intent." Gonzalez, supra, 168 Wn.2d at 265. Clearly by changing these terms, the Legislature intended something more forceful in the new statute.

d. Juveniles Committing Sex Crimes

A person aged 12 or older is presumed to be capable of committing crime. RCW 9A.04.050. The Legislature acknowledges that children without

legal criminal capacity still may commit acts that would constitute a sex offense. Such children shall be investigated to determine whether the child can be prosecuted or is in need of services as a "sexually aggressive youth." RCW 26.44.160.

The Legislature has included juvenile sex offenders in the group subject to commitment as sexually violent predators.

Q.L.M. v. D.S.H.S., 105 Wn. App. 532, 536, 20 P.3d 465 (2001); RCW 71.09.030. In Q.L.M., the court ordered a sexually aggressive youth evaluation for a 14-year-old -- the same age Kevin Kannada was when he first assaulted Amy Schorno. Id. at 534.

The Washington State Sentencing Guidelines Commission reports approximately 20 juvenile convictions of rape 2° or rape 3° annually since 2002. See Rape 2 and Rape 3 Offenses for Juvenile by Age Fiscal Year 2002-2010 (Appendix A). Presumably some of these prosecutions involved adult victims. They most likely did not involve victims within the age limits of child sexual abuse, or the prosecutor would have charged that easier-to-prove crime instead.

e. Physical Resistance and Rape in the Third Degree

Washington adopted its sex offense statutes quoted above in 1975. The new statutes were intended to reform the definitions of sex offenses and reflect the realities of victims' experiences.

Traditional rape laws often required the victim physically to resist her attacker, required corroboration of the victim's testimony, and allowed evidence of the victim's past sexual conduct to be admitted at trial. The rape reform movement emerged in the early 1970s in response to criticisms of these laws. By the mid-1980s nearly all states had enacted some type of rape reform legislation. One of the most common changes was "eliminating the requirement that the victim physically resist her attacker." Spohn, C., "The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms," 39 JURIMETRICS J. 119, 119-22 (1999).

Studies have ... demonstrated that assailants do not typically use physical violence to rape, but instead generally use verbal coercion or manipulation. Indicative of the subtle force used, most assailants do not use weapons and the victims rarely have any external or internal injuries. What victims point to instead as the "force" used is the

assailant's size, his verbal attacks, his anger, and his refusal to acknowledge repeated verbal resistance. A low-level of "force" then, which is often quite subtle, is the most typical degree of force used. These findings support the assertion that, while the presence of overt force may be probative of rape, its absence is not.

... Instead of physically resisting, several studies have found that the overwhelming response by victims is verbal: victims try to reason with the assailant, tell him no, make him feel guilty, cry, or tell him to stop. Other victims are unable to respond because they experience a paralyzing fear. Victims may also not resist to inhibit the assailant's use of violence, force, or aggression. For whatever reason, not resisting is often the wiser choice since the risk of injury may increase with any kind of resistance.

Edwards, D., *Comment: Acquaintance Rape & the "Force" Element: When "No" Is Not Enough*, 26 GOLDEN GATE U. L. REV. 241, 268-70 (1996) ("Acquaintance Rape").

Many rape statutes require significant evidence of force or violence. These statutes fail to recognize that

if the victim has said "no," and the perpetrator continues, the next physical action is in itself, coercive. The assailant knows the victim has refused, and thus his action can only be characterized as intentionally coercive and threatening. His actions, at this point, speak louder than words: by ignoring her "no," he is telling her she will participate.

Acquaintance Rape, at 279.

Washington's statute defining rape in the third degree, however, was designed specifically to address this reality.

Under the third degree [rape] statute, the "force" element and "resistance" requirement were eliminated. In addition to penetration, the state must instead prove only lack of consent "clearly expressed by the victim's words or conduct."

Acquaintance Rape, at 290; RCW 9A.44.060.

For decades, women have been warned not to physically resist sexual assaults at the risk of suffering greater physical injury.⁸ One court

⁸ See e.g.: James Gregor, "Saying 'No' Should Be Enough," *Chicago Tribune* at A9 (7/3/1994) ("The current teaching of rape counselors as to how to respond to would-be rapists ... [is] to show no resistance."); Sally Kalson, "Rape Wisdom Doesn't Mean Neglect Wits," *Pittsburgh Post-Gazette* at C1 (6/6/1994) ("Don't fight back... That is the maxim of rape survival that has been drummed into women's heads for 25 years. Resist and die; submit and live."); Myriam Marquez, "With Rape, It's Resist and Get Beaten, Or Don't Resist and Get Blamed," *Salt Lake Tribune* at A9 (8/2/1994) ("Don't fight back; don't fight back. It has become a mantra, repeated over and over and over by experts at crime-watch meetings throughout the United States."); Dale Russakoff, "Where Women Can't Just Say No," *Washington Post* at A1 (6/3/1994) (quoting spokeswoman from Pennsylvania Coalition Against Rape stating "what we've been teaching women all these years [is that] to physically resist...risks serious bodily injury"); see also William Sanders, *RAPE & WOMEN'S IDENTITY* 137 (1980) ("Women are cautioned against fighting back for fear of being

noted a public service pamphlet from the Maryland Prince George's County Police Department warning women:

Extensive research into thousands of rape cases indicates that attempts at self defense, such as screaming, kicking, scratching and use of tear gas devices and other weapons, usually have provoked the rapist into inflicting severe bodily harm on the victim. Since it is unlikely you will be able to overcome the rapist with force, you must think about what he will do if you try and fail. Before you do anything, remember ... IF WHATEVER YOU DO DOES NOT HELP YOU, MAKE SURE THAT IT WILL NOT HARM YOU.

Rusk v. State, 43 Md. App. 476, 497 n.15, 406 A.2d 624 (1979) (Wilner, J., dissenting) (emphases in the original), reversed, State v. Rusk, 289 Md. 230, 424 A.2d 720 (1981).

Indeed, Amy Schorno's encounters with Kevin Kannada bore out the wisdom of these warnings. As his assaults continued, she began to resist more assertively. His response was to injure her, hit her with objects, choke her, and threaten other physical harm. CP 102-07, 136-55.

In State v. Weisberg, 65 Wn. App. 721, 829 P.2d 252 (1992), the defendant drew his female

severely beaten or killed."). Anderson, M.J., *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 957 n.29 (1998).

neighbor to his apartment by promising her a birthday gift of clothing. In the bedroom, he told her to take off her underwear and bra because the clothes would fit better. When she didn't respond, he took them off for her. He told her to lie on the bed. When she said she didn't want to, he told her to "go ahead and lay on the bed anyway." He then engaged in sexual intercourse with her.

At trial he was convicted of second degree rape. The Court of Appeals held there was insufficient evidence of "forcible compulsion," but sufficient evidence of clearly expressed lack of consent to support a conviction for third degree rape. The victim's refusal to remove her clothes and to lie on the bed indicated her lack of consent.

The words, "lay down on the bed anyway", in response to P.C.'s objection, suggest Weisberg's disregard for P.C.'s feelings and arguably could suggest that resistance would be futile because physical force would be used if necessary to obtain compliance.

Weisberg, at 726. This legal result would have been the same had the defendant been 14 or 15.

In McKnight, the court found forcible compulsion when the perpetrator continued to

disrobe the victim after she repeatedly asked him to stop. The act of slowly pushing the victim onto a bed was sufficient "force" to be "forcible compulsion" when the victim had said no. Id. at 525-26. The court affirmed the conviction for rape in the second degree. See also State v. Gonzales, 18 Wn. App. 701, 702, 571 P.2d 950 (1977), review denied, 90 Wn.2d 1014 (1978) (jury may find victim submitted to sexual act because of an implied threat of physical injury to herself, although no overt threat made).

In this case, Kevin Kannada forced a kiss on Amy Schorno when she was not expecting it. She pushed him away, said "no," "you can't do that," and threatened to tell her husband. These words and conduct clearly indicated her lack of consent.

In the incident on which the trial court relied, Kevin Kannada exposed himself to Amy Schorno as she was driving him home. He told her to put her hand on his penis. She said "no." Despite this clear expression of lack of consent, he then took her hand off the steering wheel and placed it on his penis. This was an "offensive touching" that Kevin Kannada perpetrated, an

assault with sexual motivation. WPIC 35.50; RCW 9A.36.041; RCW 13.40.135; RCW 9.94A.030(43). He disregarded her verbal protests and used physical coercion to accomplish his sexual assault. To the extent it was forcible compulsion, it was indecent liberties. RCW 9A.44.100.

f. "Strict Liability Crime"

Kevin Kannada claims child sexual abuse is a "strict liability crime." CP 56-57. Indeed, the courts have used such language to hold the crime does not require proof of a specific mens rea. But the cases on which he relies did not involve, as this case does, a claim that the criminal defendant was the victim and not the perpetrator of the sexual contact or intercourse.

i. State v. Abbott

In State v. Abbott, supra, the court interpreted the former statute prohibiting statutory rape in the first degree, RCW 9A.44.070 (quoted above). Procedurally, the defendant moved to withdraw his guilty plea on the grounds that he was not advised of the mens rea necessary for the crime.

When the Legislature fails to specify a given degree of culpability to constitute

the activity deemed punishable as a crime, the courts may sometimes find that the statute contains an implied element of specific intent or guilty knowledge before the perpetrator can be said to have committed the crime. . . . But the courts will not find an implied element in the face of a legislative intent to the contrary.

Abbott, 45 Wn. App. at 332 (citations omitted).

The court concluded that, with former RCW 9A.44.070,

the Legislature has imposed strict criminal liability upon those **persons** over age 13 **who engage in acts** of sexual intercourse with persons younger than themselves by 2 or more years.

Id. at 333-34 (emphases added). Nowhere did Mr. Abbott claim that he did not "engage in acts of sexual intercourse" or that the child under age 11 had committed the crime against him.

It is noteworthy that the Legislature changed the statutory structure of the crimes prohibiting child sex abuse, and changed its language. The current statutes require more than mere "engaging" in acts of sexual intercourse; they make guilty only the "perpetrator" of the acts. RCW 9A.44.079, 9A.44.089, supra.

ii. State v. T.J.M.

In State v. T.J.M., 139 Wn. App. 845, 162 P.3d 1175 (2007), review denied, 163 Wn.2d 1025 (2008), a 13-year-old juvenile was convicted of rape of a child in the first degree for perpetrating sexual intercourse against an 11-year-old boy he invited to sleep over at his house.

On appeal, the juvenile challenged the constitutionality of the statute as violating his right to equal protection and substantive due process by not permitting a consent defense. He claimed the statute allowed the trier of fact to presume a child victim cannot consent to sexual intercourse when the victim is more than two years younger than the perpetrator; but also should permit evidence to overcome the presumption. The Court of Appeals upheld the statute as constitutional, concluding there is a rational relationship between the age designations and the Legislature's goal of protecting younger children from sexual acts by "older, potentially predatory persons." Id. at 847.

The consent of the younger child is not a defense if the older person "causes" the activity,

i.e., is "the perpetrator." In enacting the child rape laws, the legislature sought

to protect the children of Washington from sexual abuse and ... reaffirm[] its condemnation of child sexual abuse that takes the form of **causing** one child to engage in sexual contact with another child for the sexual gratification of **the one causing such activities** to take place.

LAWS OF 1994, ch. 271, § 301; T.J.M., at 852. Accord: State v. Heming, 121 Wn. App. 609, 90 P.3d 62 (2004), review denied, 153 Wn.2d 1009 (2005) (defendant failed to prove child rape statute's age classifications were purely arbitrary; court finds they meet the rational basis test).

iii. State v. Deer

In State v. Deer, 158 Wn. App. 854, ___ P.3d ___ (2010), the Court of Appeals vacated convictions for rape of a child in the third degree because the trial court wrongly permitted the State to amend the charges after the State rested its case. Beyond this holding, the Court offered dicta discussing an instructional issue:

[T]he jury instructions given by the trial court relieved the State of its burden of proving beyond a reasonable doubt all elements of the crimes charged, including the implied element of a volitional act. We conclude that the

instructions given did, indeed, suffer from this deficiency.

Deer, 158 Wn. App. at 857. Thus the court held that rape of a child in the third degree requires the plaintiff to prove the implied element of a volitional act.

In Deer, there were multiple sexual "encounters" between Ms. Deer and 15-year-old R.R. over a period of months. The first was when R.R. left the couch where he was to sleep and got into bed with Ms. Deer, who was asleep. He placed her hand on his penis; he testified that she inserted his penis into her vagina. Ms. Deer testified she was asleep during the incident.

In another incident, Ms. Deer performed oral sex on R.R. "Deer testified at trial that she did not willingly participate in the oral sex." R.R. testified he again got into her bed and had intercourse with her that night.

There were two other encounters to which Ms. Deer did not contend she was asleep. However, she testified that R.R. forced intercourse on her on one of those occasions.

The prosecutor and defense jointly proposed a jury instruction that would have required the State

to prove beyond a reasonable doubt that Ms. Deer committed a "volitional" act.

The trial court later determined not to give the proposed instruction and instead gave the jury an instruction stating:

It is a defense to the charge of Rape of a Child in the Third Degree that the child had intercourse with the defendant without the knowledge or consent of the defendant.

The defendant has the burden of proving this defense by a preponderance of the evidence.

Deer at 860. The Court of Appeals stated this instruction was error.

Every crime consists of two components: (1) an actus reus and (2) a mens rea. ... The actus reus is "[t]he wrongful deed that comprises the physical components of a crime," while the mens rea is "[t]he state of mind that the prosecution ... must prove that a defendant had when committing a crime." ... Although the "legislature has the authority to create a crime without a mens rea element," ... even such "strict liability" crimes require "a certain minimal mental element ... in order to establish the actus reus itself." ... "This is the element of volition." ... See also Black's, supra, at 1710 (defining "volition" as "[t]he act of making a choice or determining something").

Deer, 158 Wn. App. at 862 (citations omitted). See also State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704 (2010) (improper to add sentencing enhancement

for possessing drugs in a jail facility when defendant possessed drugs when arrested and police found drugs only after they took him, against his will, to the jail facility).

The Eaton Court explained the difference between intent and volition:

The State appears to be under the misapprehension that requiring volition is the same as requiring intent. But nothing in our opinion should be read as requiring that the State prove a defendant intended to be in the enhancement zone or even that she knew she was in the enhancement zone. The State must simply demonstrate that the defendant took some voluntary action that placed him in the zone.

Eaton, 168 Wn.2d at 485-86 n.5.

This is consistent with our legislature's pronouncement that the provisions of our criminal code must be interpreted "[t]o safeguard conduct that is without culpability from condemnation as criminal."

Deer, 158 Wn. App. at 864; RCW 9A.04.020(1)(b).

Being a victim of sexual assault is "conduct that is without culpability." Statutes should not be interpreted to condemn such victimization as criminal.

The Court of Appeals proceeded to distinguish, however, between Ms. Deer's contention she was asleep during at least one of the sexual

encounters, and her contention that she "did not consent" to other encounters. Because the perpetrator's consent is not an element of the crime of rape, the Court cautioned that an instruction on duress "may be appropriate" in such a case. Deer, 158 Wn. App. at 864-65.

Notably, the Deer court did not consider a claim that R.R. was "the perpetrator," as is claimed here. The actus reus of the crime requires a volitional act. But it also requires proof of which person perpetrated, or committed, the actus reus.

Deer also did not distinguish between an adult failing to say "yes" and clearly saying "no." Expressly saying "no" is "clearly expressing a lack of consent." See RCW 9A.44.060, supra. Claiming one did not say "yes" does not have the same legal effect as expressly saying "no," as occurred here.

Our courts have held that "consent," i.e., "clearly expressed words or conduct indicating a freely given agreement" to engage in sexual acts, negates the element of forcible compulsion. It is not, however, a defense to child sexual abuse.

Nonetheless, if the juvenile perpetrates the sexual act over the adult's "clearly expressed lack of consent," the adult is the victim, not the perpetrator. If the adult is not the perpetrator, that fact negates an essential element of rape of a child 3° or child molestation 3°. RCW 9A.44.079, .089.

4. DURESS REQUIRES ONLY AN IMPLICIT THREAT,
NOT AN EXPLICIT THREAT

Even if duress were presented as a defense, this record is sufficient to preclude summary judgment against that theory.

In State v. Harvill, supra, the Supreme Court held that the defense of duress does not require an express threat explicitly spelling out what would occur. Evidence that the defendant perceived an implied threat is sufficient to present the defense to the jury. In Harvill, the defendant was charged with unlawful delivery of cocaine. He claimed he sold cocaine to Nolte, the informant, "because he feared that, if he did not, Nolte would hurt him or his family."

Harvill testified that he received 9 or 10 calls from Nolte in the days leading up to the controlled buy in which Nolte insisted that Harvill get Nolte some cocaine. ... Nolte would say, "You

gotta get me something," or "You better get me some cocaine," and his tone was aggressive. ... But, Harvill could not recall Nolte ever saying "or else" or words to similar effect. ... Harvill claimed that he was afraid that Nolte would immediately come to Chuck E. Cheese's and drag him or one of his family members outside and hurt one of them if Harvill refused to get Nolte some cocaine.

Id., 169 Wn.2d at 256-57.⁹ The Court especially noted that Nolte was 5'10" and 200 pounds, when Harvill was only 5'5" and 140 pounds.

While the trial court refused an instruction on duress, the Supreme Court reversed. It held this record was sufficient to present the issue to the jury.

Similarly, in State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997), Ms. Williams was charged with welfare fraud when she failed to report her abusive live-in boyfriend's income to DSHS. She argued her boyfriend had ordered her not to disclose his income and she feared he would severely hurt her or her children if she disobeyed

⁹ Compare these threats with Ms. Schorno's experience: "He would call me and tell me a time or times that I had to call him back and on which phone line, their home line or fax line, and he'd tell me that I'd 'better' call. He would tell me that he was going to call my home at a certain time, and that I'd 'better' answer." CP 103.

him. The trial court rejected her requested jury instruction on duress because, as her boyfriend frequently left town for his work, the threat of harm to her was not "immediate" under the statute.

The Supreme Court reversed, holding

the duress statute does not require that it actually be possible for the harm to be immediate. Rather, it directs the inquiry at the defendant's *belief* and whether such belief is reasonable.

Williams, 132 Wn.2d at 259 (Court's emphasis).

"Because Williams testified that she believed the threat was of immediate harm and had expert testimony suggesting that such a belief was reasonable, the immediacy of the harm was a jury question." Harvill, 169 Wn.2d at 260.¹⁰

In both Harvill and Williams, the Court held the trial court abused its discretion by refusing to instruct the jury on the question of duress. In both cases, it held the issue was one of fact for the jury to decide.

Even on this record, there is sufficient evidence that the question of duress is one of fact and must go to the jury, if the defense requests an

¹⁰ See Declaration of Kathy Cox, M.S.W., as expert on effects of long-term sexual and domestic violence. CP 123-26.

instruction on that theory. Taking all the evidence in the light most favorable to the non-moving party, it certainly does not support summary judgment as a matter of law.

D. CONCLUSION

In a claim for child sexual abuse or rape in the third degree, the law requires the claimant to prove the defendant was "the perpetrator." In this case, that is an issue of fact. Taking the evidence in the light most favorable to the non-moving party, Amy Schorno, there was sufficient evidence to present that factual issue to a jury.

The law does not limit a woman to the claim of duress, to fearing or physically resisting at the risk of placing herself in greater physical danger, to resist a sexual assault. The trial court erred by interpreting these statutes and this record to hold that duress is the only defense available to Amy Schorno for the claimed child sexual abuse. If a jury finds she was the victim of sexual assault, she cannot be a "perpetrator" of child sexual abuse.

This Court should reverse the partial summary judgment and remand for trial to the jury on the issue of who was the perpetrator.

DATED this 18th day of January, 2011.

Respectfully submitted,


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APPENDIX A

WASHINGTON STATE SENTENCING GUIDELINES COMMISSION
RAPE 2 AND RAPE 3 OFFENSES FOR JUVENILE
BY AGE FISCAL YEAR 2002-2010

RAPE 2 AND RAPE 3 OFFENSES FOR JUVENILE BY AGE FISCAL YEAR 2002-2010*

Fiscal Year	Offense	Age					Grand Total**	
		12	13	14	15	16		17
2002	Rape 2						3	9
	Rape 3		5		4		4	16
	Total	-	7	2	6	3	7	25
2003	Rape 2					4		6
	Rape 3				8	4		15
	Total	-	-	2	9	8	2	21
2004	Rape 2			3	4		6	17
	Rape 3				3		5	10
	Total	1	3	4	7	1	11	27
2005	Rape 2			4		4	5	16
	Rape 3					3		9
	Total	3	1	4	3	7	7	25
2006	Rape 2					3		11
	Rape 3				3			9
	Total	3	2	3	5	4	3	20
2007	Rape 2		3					7
	Rape 3						3	8
	Total	-	3	3	3	3	3	15
2008	Rape 2					4		10
	Rape 3			4	5			12
	Total	3	1	4	6	6	2	22
2009	Rape 2			3	3		5	13
	Rape 3							8
	Total	1	2	5	5	3	5	21
2010	Rape 2							3
	Rape 3							6
	Total	1	-	3	1	1	3	9

*Individual juvenile offender may be responsible for more than one of the offenses shown.

**Cells with number less than 3 are suppressed to avoid identification of the offenders. The total cells include numbers in suppressed cells.

11 JAN 20 AM 11:34

STATE OF WASHINGTON
BY  _____
DEPT

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

7	AMY CATHERINE SCHORNO,)	
)	
8	Petitioner,)	NO. 39752-8-II
)	
9	vs.)	DECLARATION OF SERVICE
)	
10	KEVIN KANNADA et al.,)	
)	
11	Respondents.)	

LENELL NUSSBAUM declares:

On this date I sent a copy of the Brief of Appellant by United States Postal Service, postage prepaid, addressed as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

18 Jan 2011

Date and Place


LENELL NUSSBAUM