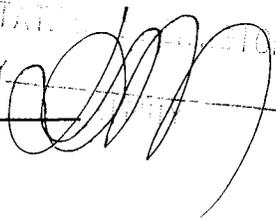


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COURT OF APPEALS

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STATE OF WASHINGTON
BY: 

COURT OF APPEALS NO. 39999-7-II

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

CHRISTOPHER MICHAEL JOHNSTON,

Defendant/Appellant.

Pierce County Superior Court Cause Number No. 09-1-02778-3

**The Honorable Bryan E. Chushcoff,
Presiding Judge at the Trial Court**

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Mr. Johnston was denied his right to a speedy trial under CrR 3.3.
2. The trial court's failure to exclude testimony that referenced possible gang-related activity and to permit closing argument about gang-related activity constitutes reversible error.
3. Mr. Johnston's trial counsel's unwarranted failure to move to dismiss based on CrR 3.3 violations and failure to move to exclude or request a limiting instruction concerning gang-related evidence prejudiced Mr. Johnston.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1, Whether the repeated trial continuances due to courtroom unavailability violated Mr. Johnston's speedy trial rights under CrR 3.3? (Assignment of Error Number One)
2. Whether the testimony and argument concerning possible gang-related activity combined with extensive references to the same during closing arguments was unfairly prejudicial to Mr. Johnston? (Assignment of Error Number Two)
3. Whether trial counsel's performance was prejudicially deficient where he failed to move to dismiss the action based on CrR 3.3 violations, failed to move to exclude gang-related evidence, and, rather than request a limiting instruction, emphasized the objectionable evidence during summation? (Assignment of Error Number Three)

III. STATEMENT OF THE CASE

1. Procedural History

On June 4, 2009, the appellant/defendant, Christopher Michael Johnston, was charged by Information with one count of first degree robbery with a deadly weapon enhancement (knife). CP 1-2.

On November 3, 2009, Mr. Johnston was convicted by jury of first degree robbery, but without a special verdict finding that he was armed with a deadly weapon. CP 80-81.

On November 13, 2009, the trial court sentenced Mr. Johnston to fifty-seven (57) months in the Department of Corrections, which represented the low end of his presumptive range. CP 83-96. A timely Notice of Appeal was filed on the same date. CP 97.

2. Trial Continuances

Mr. Johnston was arraigned on June 4, 2009. He was detained in the Pierce County Jail thereafter. CP 1-2. The trial court ordered nine (9) trial continuances. The trial began on October 27, 2009, which was one hundred forty five (145) days after Mr. Johnston was arraigned.

The first trial continuance occurred on July 28, 2009 over Mr. Johnston's objection. The motion was agreed to by the attorneys and the reason was "continuing investigations...." The order Continuing Trial did not note the CrR 3.3 rule under which it was extending Mr. Johnston's time for trial. CP 10.

The second trial continuance occurred on September 1, 2009 "for administrative necessity." The reason for that continuance was no available courtrooms. CP 11.

On September 8, 2009, a third trial continuance occurred, again due to "administrative necessity" based on the unavailability of courtrooms. CP 12.

A fourth trial continuance was ordered on September 10, 2009 over Mr. Johnston's objection. ¹ CP 12; RP 9-10-09, 6. The continuance was granted pursuant to CrR 3.3(f)(2) on the grounds that no courtrooms were available and the defense attorney now had other

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The Verbatim Report of Proceedings are not all numbered. Mr. Johnston will, therefore, refer to the date of the unnumbered proceedings followed by the page number, for purposes of Appellant's Opening Brief.

trials scheduled between September 13, 2009 and September 21, 2009.

CP 14.

On September 28, 2009, Mr. Johnston's trial was continued for the fifth time again over his objection. RP 9-28-09, 10. The court did not signify the court rule provision under which the continuance was granted. The reason given was that both attorneys were in trial. CP 15.

On October 12, 2009, no courtrooms were available once more, and a sixth continuance was ordered. CP 10. On October 13, 2009, still no courtrooms were available. A seventh continuance was ordered. A Department Status List was filed with the Trial Continuance Order. Mr. Johnston continued to object. CP 17-24.

On October 14, 2009, over Mr. Johnston's objection, the eighth continuance was granted due to the unavailability of courtrooms, again on the basis of "administrative necessity." A Department Status List was filed. CP 25-32. The ninth and final trial continuance was ordered on October 16, 2009 on the state's motion, because the DPA was in another trial. Mr. Johnston continued to object. CP 33. The trial was continued until October 26, 2009, which is the date the trial began.

3. **Factual Summary**

On June 2, 2009, at about 7:30 p.m., Christopher Fagot was walking alone through Hidden Village Park in Spanaway. RP 2 27-28. Someone he knew named Nick called to Mr. Fagot. Nick was standing with a large group of between ten to fifteen (10-15) people. RP 2 29. Mr. Fagot testified that the appellant, Mr. Johnston, was among the members of that group. Mr. Johnston asked him if he wanted to buy some “weed,” and also asked him what “hood” he was from. RP 2 29-30. Another man, who Mr. Fagot identified in court as Marcus Reed, asked Mr. Fagot if he had any money. Mr. Fagot replied that he did not. Mr. Reed said “I’m going to be straight up. This is a pocket check.” RP 2 30. Mr. Fagot testified that Mr. Reed then pulled out a knife with a four inch blade. Mr. Johnston said “Show respect to him and just give him your money.” RP 2 32-33.

Mr. Fagot emptied his pocket contained a \$5.00 bill and some change. Mr. Reed then took the bill but not the change. Mr. Reed said “I don’t want your chump change. Have more next time.” RP 2 36. Mr. Fagot left the park. He went to Walmart, got his brother, and they

went to McDonalds to eat. RP 2 36-37. Mr. Fagot went home and called his mother, and then 9-1-1. RP 2 38.

Deputy Matthew Hirsche was working alone on the evening of June 2, 2009. At about 10:30 p.m he responded to Mr. Fagot's 9-1-1 call. RP 2 69-71. Deputy Hirsche had a description of one possible suspect and a "very distinct vehicle" - - a Honda with spoke rims - - that was allegedly parked near where the incident occurred. RP 2 72. Deputy Hirsche drove to the site. He saw the car and a man who matched the description of the possible suspect. That man was Marcus Reed. RP 2 73-74.

Deputy Hirsche contacted a large group of people. He separated Mr. Reed to talk with, then later returned Mr. Reed to the group. RP 2 74. The people in the group were detained by Deputies Helligso and Marquiss, who had arrived to assist. RP 2 75. Deputy Hirsche then had Mr. Fagot prepare a written statement. Next, the deputy took Mr. Fagot to the scene to identify possible suspect. The group of people were placed side by side in a line, and the patrol vehicle's spotlight was shined upon them. RP 2 77. Mr. Fagot pointed out two of the people;

one was Mr. Reed, the other Mr. Johnston. RP 2 76. Both Mr. Reed and Mr. Johnston were arrested. RP 2 78. Deputy Hirsche located \$70.00 in cash in Mr. Johnston's pocket. The money was neatly folded together and in sequential order, e.g., "5s, 10s, 20s." RP 2 82. Additionally, there was a separate, single, five-dollar bill "stuffed into" Mr. Johnston's pocket. RP 2 82.

Mr. Johnston presented three defense witnesses at trial. The first was his mother who testified that she had given him a \$20.00 bill on June 1, 2009 for his birthday. She also testified that her son is not of African-American heritage. This information was relevant because Mr. Fagot had described the second man in the robbery as black. RP 2 128-129.

Mr. Johnston's aunt testified that on June 1, 2009 she wrote Mr. Johnston a check in the sum of \$50.00 for his birthday, and that the check had been cashed. RP 2 133-134.

Marcus Reed, the co-defendant, testified that his comments to Mr. Fagot were made in jest, that Mr. Fagot have him the money voluntarily, and that Mr. Johnston had no involvement whatsoever in

the incident. RP 2 138-163. Mr. Reed had already pleaded guilty to second degree robbery in this case. RP 2 164.

IV. ARGUMENT

A. MR. JOHNSTON'S RIGHT TO A SPEEDY TRIAL PURSUANT TO CrR 3.3 WAS VIOLATED, REQUIRING REVERSAL OF THE CONVICTION AND DISMISSAL OF THE ACTION.

Superior Court criminal rule CrR 3.3 (b) establishes the time for trial requirements. A defendant who is detained in jail must be brought to trial within sixty (60) days from the date of arraignment. CrR 3.3 (b)(1). The remedy for a violation of the time for trial is automatic dismissal with prejudice. CrR 3.3(h). The application of the speedy trial rule to a particular set of facts is a question of law subject to de novo review. *State v. Raschka*, 124 Wn.App. 103,108,100 P.3d 339 (2004).

Mr. Johnston's arraignment date was June 4, 2009. His trial began on October 27, 2009, one hundred forty-five (145) days post arraignment. Nine continuances were ordered. Of those, six continuances were ordered either solely or primarily because of

courtroom unavailability.

In State v. Kenyon, our Supreme Court held that when a trial is continued beyond the speedy trial limits under the claim that no superior court departments are available to hear the case, as happened here, the trial court is required to make a careful record, which include a reasoned determination of whether a judge pro tempore could be used. Without such a record, dismissal with prejudice is required. State v. Kenyon, 167 Wn.App. 2d 130,216 P.3d 1024 (2009 (en banc)); State v. Saunders, 153 Wn.App. 209,220 P.3d 1238 (2009); CrR 3.3. In reviewing an alleged violation of the speedy trial rule, the appellate court applies the rule to the particular facts to determine whether there exists a violation that mandates dismissal. State v. Carlyle, 84, Wn.App. 33,35,925 P.2d 635 (1996).

The courts have “consistently interpreted CrR 3.3 so as to resolve ambiguities in a manner which supports the purpose of the rule in providing a prompt trial for the defendant once prosecution is initiated.” State v. Edwards, 94 Wn.2d 208, 216, 616 P.2d 620 (1980).

. . . [P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved.

State v. Striker, 87 Wn.2d 870, 876-77, 557 P.2d 847 (1976) (citations omitted).

A defendant who has not been brought to trial within the time limits of CrR 3.3(b) is not required to show actual prejudice. Instead, failure to comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice. State v. Kenyon, *Supra*.

In the case at bar, the requisite record under State v. Kenyon, was not made by the trial court. Only two of the continuance orders (October 13th and October 14th, 2009) were accompanied by Department Status Lists, Status Lists which standing alone, are likely insufficient to satisfy the strict record requirements of State v. Kenyon. Even assuming the October 13th and October 14th Orders were in compliance with State v. Kenyon, Mr. Johnston's speedy trial rights were nonetheless violated by the other four continuances ordered due to courtroom unavailability where no such record was made. Mr. Johnston did not waive his speedy trial rights. He repeatedly and specifically objected to the trial continuances, although his trial counsel did not. Mr. Johnston's remedy is dismissal of the conviction with

prejudice.

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING IRRELEVANT, UNFAIRLY PREJUDICIAL GANG-RELATED EVIDENCE, AND PERMITTING ARGUMENT TO THE JURY CONCERNING POSSIBLE GANG ACTIVITY.

During trial, Christopher Fagot testified that Mr. Johnston had asked him what “hood” he was from. Upon further questioning by the prosecutor, Mr. Fagot testified that the question meant was what gang was he in.

Mr. Fagot: He asked me what “hood” I’m from. I told him nothing.

Prosecutor: What did that mean to you when they asked you what hood you were from?

Mr. Fagot: Like what gang, if I’m in a gang....

Prosecutor: And then the person that asked if you wanted to buy some weed and asked you what hood you were from, what did that person look like? RP 2 30. (Mr. Fagot then identified Mr. Johnston. RP 2 31.)

Mr. Johnston’s counsel did not object.

Additionally, Mr. Johnston’s trial attorney offered Mr. Fagot’s written statement without redaction. (Exhibit No. 1). The statement

contained assertions concerning Mr. Johnston questioning him about his “hood.” RP 2 49.

During cross-examination of Marcus Reed, the prosecutor again brought up gangs when he asked the witness:

Prosecutor: And that report says that, first, before you entered the plea, you said that it was Mr. Johnston, Chris, who asked about the gangs and stuff, right? RP 3 163.

Notably, the prosecutor was now using the word “gangs” rather than the term “hood.” The prosecutor again emphasized the gang aspect while presenting his closing argument.

Prosecutor: Well, I’m going to suggest to you that what Mr. Johnston did, that he asked here, okay. Nick - - apparently, according to Mr. Fagot, Nick, initially called him over, and then Christopher Johnston said to him, “What’s up? What hood are you from?” All right. What hood are you from? To Mr. Fagot, that meant, what gang do you run with, right? That is something that they wanted to know if it was going to be safe to rob the guy, right? He says to them - - once he decided that - - green light so far, right? The guy is wearing red clothes and a red hat, apparently. A red shirt and a red hat. It’s possible, I guess, one might think that that could be some kind of gang colors, all right. RP 3 175-176.

Mr. Johnston’s trial counsel made no objection, nor did he request a limiting instruction concerning the gang testimony and argument. Rather, defense counsel immediately began to discuss the

gang aspect during closing argument thereby highlighting it further:

Defense Attorney: Mr. Howe brought up the issue that the victim was wearing red, that there was talk of what hood are you from. I don't agree, that because somebody happens to be wearing red, that may be a sign of gang affiliation or spark in anybody that maybe he is in a rival gang. That's the only information that we have about anything to do with a gang here. It is a red herring. It is totally a red herring. It doesn't have anything to do with the facts of this case.

Let's assume that it is some type of gang-related - - what kind of gang would that be for my client then? He is wearing a white shirt. Whether you believe it was a T-shirt or a tank top, what gang wears white? I don't know. We don't know what color Marcus Reed or any of the others were wearing because nobody ever got into that. To inject into this that it is some type of gang activity is just not reasonable. I know Mr. Howe would disagree, but there is nothing to support that. RP 3 200.

Again, during rebuttal closing, the prosecutor discussed the "gang-related" aspect. RP 3 211.

The gang-related testimony and argument was improper. A court cannot admit "[e]vidence of other crimes, wrongs, or acts ...to prove the character of a person in order to show action in conformity therewith." ER 404(b). It may, however, admit such evidence for

another purpose, “such as proof of motive, plan, or identity.” *State v. Foxhoven*, 161 Wn.2d 168,175,163 P.3d 786 (2007) (citing ER 404(b)).

“ER 404(b) is not designed ‘to deprive the State of relevant evidence necessary to establish an essential element of its case,’ but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” *Id.* (Quoting *State v. Lough*, 125 Wn.2d 847,859,889 P.2d 487 (1995)).

In the case at bar, gang-related evidence was not relevant to establish any of the elements of the charged crime. The only fathomable way that this evidence of prior bad acts was admissible, therefore, is if it was admitted for some other purpose such as motive to commit the crimes charged. Assuming that the improper ER 404(b) character evidence was offered for some other permissible purpose, the court did not conduct the necessary inquiry on the record for admitting the evidence in the first place.

“Before admitting ER 404(b) evidence, a trial court ‘must (1) find by a preponderance of the evidence that the misconduct occurred,

(2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” *Foxhoven*, 161 Wn.2d at 175 (internal citations omitted); *State v. Asaeli*, 150 Wn.App. 543,576,208 P.3d 1136 (2009)). The proceeding four-part analysis “must be conducted on the record.”² *Foxhoven*, 161 Wn.2d at 175 (emphasis added). “If the evidence is admitted, a limiting instruction must be given to the jury.” *Id.* (emphasis added).

State v. Asaeli, Supra, is on point. There, the Court reversed the defendant’s conviction after gang-related evidence was admitted. *Asaeli*, 150 Wn.App. at 573-80. The *Asaeli* Court found that the gang-related evidence was unfairly prejudicial and a new trial was required. *Asaeli*, 150 Wn.App. at 579-80. “An [evidentiary] error is prejudicial if, ‘within reasonable probabilities, had the error not occurred, the

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“If the record show that the trial court adopted one of the parties’ express arguments as to the purpose of the evidence and that party’s weighing of probative and prejudicial value, then the trial court’s failure to conduct its full analysis on the record is not reversible error.” *Asaeli*, 150 Wn.App. At 577 (citing *State v. Pirtle*, 127 Wn.2d 628,650-51,904 P.2d 245(1995)).

outcome of the trial would have been materially affected.’” *Id* (quoting *State v. Neal*, 144 Wn.2d.

Likewise, in Mr. Johnston’s case, the gang-related evidence and argument was unfairly prejudicial. The evidence, while sufficient to sustain a conviction, was not compelling. The sole eye-witness was Mr. Fagot, whose description of the second man, the man who aided Mr. Reed, did not closely match Mr. Johnston. Mr. Fagot’s written statement, which he made a few hours after the robbery, described the second man as a short, skinny, black guy. RP 2 49-50. Mr. Johnston was, in fact, six (6) feet tall, not skinny, and white. Mr. Fagot failed to mention a second man at all in his 9-1-1 call. The group of people remained at the park after the incident, but no knife was ever found.

Mr. Fagot selected Mr. Johnston from a fifteen (15) person line up where it was dark, nighttime, and the only light source emanated from the police patrol car. At most, Mr. Johnston’s role was to support Mr. Reed by verbally encouraging Mr. Fagot to give Mr. Reed the money. There is a reasonable probability that the gang-related evidence and argument tipped the scales in an otherwise weak case.

Assuming, only for the sake of argument, that it was not reversible error to admit the evidence, Mr. Johnston would nonetheless be entitled to a new trial for failure to present the jury with a limiting instruction. The law is plain and well settled. If character or other bad acts evidence is admitted for some permissible purpose (such as motive or plan), “a limiting instruction must be given to the jury.” *Foxhoven*, 161 Wn.2d at 175. See also WPIC 5.30. Here, at the very least, it was reversible error not to instruct the jury as to the limited purpose for considering gang-related evidence.

C. MR. JOHNSTON WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL ATTORNEY FAILED TO CONTEST THE SPEEDY TRIAL VIOLATION, FAILED TO OBJECT TO THE GANG-RELATED EVIDENCE AND ARGUMENT, AND FAILED TO REQUEST A LIMITING INSTRUCTION.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon V. Wainwright*, 372 U.S. 335, 342, 83

S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel. . . .” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.) United States v. Salemo, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and facts requiring *de novo* review. In re Fleming, 142 Wn. 2d 853, 865, 16 P.3d 610 (2001), State v. Horton, 136 Wn.App. 29, 146 P.2d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness, and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the

proceeding would have differed.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing Strickland) see also State v. Pittman, 134 Wn.App. 376, 383, 166 P.3d 720 (2006).

A defendant has a fundamental right to a speedy trial under Article I, Section 22 (Amendment 10) of the Washington State Constitution and the Sixth Amendment to the United States Constitution Barker v. Wingo, 407 U.S. 514, 33 L.Ed. 2d, 101, 92 S.Ct. 2182 (1972); State v. Franulovich, 18 Wash.App. 290, 567 P.2d 264 (1977), review denied 90 Wash.2d 1001 (1978). As discussed in Argument No. I, a defendant who is detained in jail pending trial is entitled to be brought to trial within sixty (60) days from arraignment. CrR 3.3.

The State and defense counsel are each responsible for seeing that the defendant is tried in a timely manner, although the trial court is ultimately responsible for enforcing the speedy trial rule. State v. Ross, 98 Wn.App. 1, 4, 982 P.2d 888 (1999). Defense counsel has an affirmative duty to protect a client’s speedy trial rights. State v. Raper, 47 Wash.App. 530, 535, 736 P.2d 680, review denied, 108 Wash.2d

1023 (1987). See also State v. White, 94 Wash.2d 498, 502-503, 617 P.2d 998 (1980), State v. Malone, 72 Wn.App. 429, 433-34, 864 P.2d 990 (1994).

Here, Mr. Johnston's trial counsel's abdication of his duty to protect Mr. Johnston's speedy trial rights constituted deficient performance, and made the difference between dismissal of the action, as required under State v. Kenyon, and proceeding with the case, thus resulting in a guilty verdict.

Additionally, Mr. Johnston's trial counsel's abdication of his responsibility to move to exclude the unfairly prejudicial gang-related evidence, and his failure to request a limiting instruction in that regard, constituted deficient performance.

An attorney's failure to propose an appropriate jury instruction can constitute ineffective assistance. State v. Cienfuegos, 144 Wn.2d 222,228-29, 25 P.3d 1011 (2001). An attorney's failure to request a jury instruction that would have aided the defense constitutes deficient performance. See Thomas, 109 Wn.2d at 226-29 (failure to propose voluntary intoxication instruction). Legitimate trial strategy or tactics

generally cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. State v. Adams, 91 Wn.2d 86,90,586 P.2d 1168 (1978)

Furthermore, the deficient performance cannot be deemed trial tactics. It served Mr. Johnston no benefit to fail to object to gang-related evidence. To not only fail to object to gang-related closing arguments, but to emphasize that aspect of the case by discussing it at length during summation (including inviting the jury to assume the crime was gang-related) constituted deficient performance. It is difficult to imagine what tactic defense counsel's actions, or inactions, might have served. Instead, defense counsel should have moved to exclude gang-related evidence and to prohibit the state from arguing it, or at the very least, have the jury instructed on the limited scope for considering that evidence. Failure to do so constituted error that, as explained above, was unduly prejudicial to Mr. Johnston. Justice demands a new trial in this case.

V. CONCLUSION

For all of the foregoing reasons and conclusions Mr. Johnston respectfully requests that this Court reverse and dismiss his conviction of first degree robbery with prejudice on the grounds that his speedy trial rights were violated under CrR 3.3. Alternatively, Mr. Johnston requests that his conviction be reversed and his case remanded for a new trial, on the basis of the inclusion of unfairly prejudicial gang-related evidence and closing argument, and because Mr. Johnston was denied his right to the effective assistance of counsel.

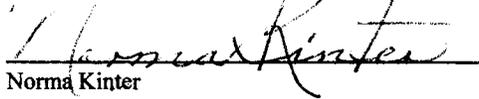
Respectfully Submitted this 28th day of June, 2010.



Sheri L. Arnold
WSBA 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on June 28, 2010, she delivered in person to the Pierce County Prosecutor, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by United States mail to Christopher M. Johnston, DOC #325687, P.O. Box 900, Shelton, Washington 98584, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury. Signed at Tacoma, Washington on June 28, 2010.


Norma Kinter

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BY 