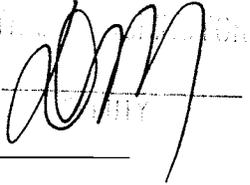


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COURT OF APPEALS

10 JUL 26 AM 10:07

NO. 40222-0-II  
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON  
BY  CITY

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STATE OF WASHINGTON,

Respondent

vs.

DOUGLAS H. COOK,

Appellant.

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BRIEF OF APPELLANT

---

APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY  
The Honorable Wm. Thomas McPhee, Judge  
Cause No. 09-1-00915-9

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the prosecutor, given Cook's objection, to improperly argue in closing that the Cook had any obligation to subpoena and call a witness.
2. The trial court erred in denying Cook's motion for a mistrial based on the prosecutor's misconduct in closing argument.
3. The trial court erred in not taking the case from the jury for lack of sufficient evidence.
4. The trial court erred in calculating Cook's offender score where it appears based on the record that a number of Cook's prior convictions "washed out."

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State committed prosecutorial misconduct in trying this matter, which deprived Cook of a fair trial? [Assignments of Error Nos. 1 and 2].
2. Whether there was sufficient evidence to uphold Cook's conviction for malicious mischief in the second degree? [Assignment of Error No. 3].
3. Whether the trial court erred in calculating Cook's offender score where it appears based on the record that a number of Cook's prior convictions "washed out"? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

1. Procedure

Douglas H. Cook (Cook) was charged by information filed in Thurston County Superior Court with one count of malicious mischief in

the second degree—domestic violence (committed against a family or household member). [CP 5].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Cook was tried by a jury, the Honorable Wm. Thomas McPhee presiding. Cook had no objections and took no exceptions to the Court's Instructions to the Jury. [RP 139]. During the State's rebuttal closing argument, the State argued:

What more do you need? If you believe his story, you—and he didn't really have a story, did he? And I want to talk about that. Robert Cook wasn't here. That's right. The dad wasn't here. The have subpoena power, too. He asked why we didn't call him. We have....

Defense:       Objection, your honor. She's implying that we have any obligation to produce evidence.

Court:         The objection is sustained.

[RP 182-183]. Upon conclusion of closing arguments, Cook immediately moved for a mistrial based on the State's improper rebuttal closing argument, which the court denied. [RP 191-195].

The jury found Cook guilty as charged of malicious mischief in the second degree and entered a special verdict finding that the crime was committed against a family or household member. [CP 17, 18; RP 196-203].

The court sentenced Cook to a standard range sentence of 21-  
months based on an offender score of 8. [CP 30-65, 71-81; 12-11-09 RP  
219-225, 229-231, 237-241]. Cook acknowledged that the following was  
an accurate statement of his criminal history:

1987	Juvenile	Burglary 2
1989	Adult	Mal. Mis. 2
1991	Adult	TMVWOP (sentenced in 1993)
2005	Adult	Theft 2
2005	Adult	VUCSA
2005	Adult	Identity Theft 1

[CP 30; 12-11-09 RP 222]. While the State in making its sentencing  
recommendation referenced Cook's "criminal history, as we discussed,  
includes 11 felonies, 13 misdemeanors and gross misdemeanors spanning  
from 1987 to 2009," nothing was made part of the record explaining when  
these misdemeanor and gross misdemeanors occurred, and, thereby why  
Cook's convictions prior to 2005 did not "wash out" given a more than a  
decade gap between his TMVWOP conviction and his 2005 convictions.  
[12-11-09 RP 223].

Timely notice of appeal was filed on January 12, 2010. [CP 84-  
95]. This appeal follows.

2. Facts

On May 25, 2009, Diane Kelly was at the home of her 83 year old father, Robert Cook (Robert). [RP 48, 52]. The two were sitting at a picnic table near the carport when Douglas Cook (Cook), Diane Kelly's younger brother and Robert's son, drove up in his truck. [RP 47, 52-53]. Cook began yelling at Diane Kelly; Cook and Diane Kelly's relationship was "pretty much nonexistent" and Cook was "evidently" angry with her "at that time." [RP 50-52, 54]. Cook then drove his truck forward approximately 50 to 70 feet then put the truck in reverse hitting Diane Kelly's car in the passenger side door. [RP 54-56, 99, 108]. Cook got out of his truck, yelled at her that "now maybe you'll leave me alone," and then drove to his home—a mobile on his father's property. [RP 48, 55-56].

Diane Kelly called the police, and Thurston County Sheriff Jonathan Anderson (Anderson) responded. [RP 56, 91]. Anderson took Diane Kelly's statement as to what happened, took photos of the damage to her car, attempted to take Robert's statement but he was uncooperative and wouldn't talk to Anderson, then went to Cook's mobile home to speak with Cook, but Cook was not at home. [RP 56-57, 91-102, 105-106].

Washington State Patrol Detective Troy Orf, an accident reconstructionist, testified, after reviewing the police report containing

photos and Diane Kelly's statement, that Cook's truck must have been traveling 10-13 miles per hour in reverse with no sign of braking when it hit Diane Kelly's car. [RP 111-112, 114-120]. The damage to Diane Kelly's car was estimated at approximately \$2700, but she sold the car un-repaired for \$500. [CP 62-65; RP 57-58, 60-61].

Cook did not testify at trial.

D. ARGUMENT

(1) THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN TRYING THIS MATTER, WHICH DEPRIVED COOK OF A FAIR TRIAL.

The law in Washington is clear, prosecutors are held to the highest professional standards. A prosecuting attorney, here the State, is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). The State Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956),

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealotry should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713 (1981), *citing* State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968).

A prosecutor has a duty as an officer of the court to seek justice as opposed to merely obtaining a conviction. Id. In cases of professional misconduct, the touchstone of due process analysis is fairness, i.e., whether the misconduct prejudiced the jury, thereby denying the defendant a fair trial guaranteed by the due process clause. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent the public interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

a. Overview Of What Occurred

At trial the State called Diane Kelly and TCSO Jonathan Anderson both of whom testified that Robert Cook, the father of Diane Kelly and Cook, witnessed the incident at issue but was uncooperative and would not talk to the police. [RP 56-57, 101-102]. Cook's counsel arguing reasonable doubt in closing mentioned that the State failed to call Robert Cook as a witness—the argument being that the evidence establishing Cook's knowing and malicious intent was Diane Kelly's uncorroborated testimony and she admittedly did not have a good relationship with Cook. [RP 172]. During the State's rebuttal closing argument, the State argued:

What more do you need? If you believe his story, you—and he didn't really have a story, did he? And I want to talk about that. Robert Cook wasn't here. That's right. The dad wasn't here. They have subpoena power, too. He asked why we didn't call him. We have....

Defense:       Objection, your honor. She's implying that we have any obligation to produce evidence.

Court:         The objection is sustained.

[RP 182-183]. Upon conclusion of closing arguments, Cook immediately moved for a mistrial based on the State's improper rebuttal closing argument, which the court denied. [RP 191-195].

b.       The Prosecutor Committed Misconduct, Over Cool's Objection, To Improperly Argue In Closing That He Had An Obligation To Produce Evidence.

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93,804 P.2d 577 (1991).

Under the due process clause of the United States Constitution, "a defendant has no duty to present any evidence. The State bears the entire burden of proving each element of its case beyond a reasonable doubt." State v. Traweek, 43 Wn. App. 99, 107, 717 P.2d 1148 (1986) (*citing In re*

Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970),  
*disapproved on other grounds by* State v. Blair, 117 Wn.2d 479, 491, 816  
P.2d 718 (1991). Accordingly, a prosecutor commits misconduct when he  
shifts the burden of proof to the defendant in closing argument by  
suggesting that the defendant had an obligation to produce evidence of his  
innocence. State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546  
(1990); State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2006)  
(generally, a prosecutor cannot comment on the lack of defense evidence  
because the defense has no duty to present evidence); State v.  
Montgomery, 163 Wn.2d 577, 597, 183 P.3d. 267 (2008) (a criminal  
defendant has no burden to present evidence, and it is error for the State to  
suggest otherwise).<sup>1</sup>

Here, the State during its rebuttal closing argument, as set forth

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<sup>1</sup> This court should note that under the “missing witness doctrine” the State may be allowed to argue that a defendant has failed to produce a witness. However, this doctrine is limited to circumstances where: 1) the missing witness is peculiarly under the defendant’s control, not equally available to the State; 2) the defendant does not satisfactorily explain the witness’s absence; 3) the inference would not infringe on a defendant’s constitutional right to silence or shift the burden of proof; and 4) the witness’s testimony would be material and not cumulative. State v. Montgomery, 163 Wn.2d at 598-99. The presence of any one of these considerations is sufficient to preclude use of the missing witness instruction or argument by the State. State v. Blair, 117 Wn.2d 479, 488-90, 816 P.2d 718 (1991). Here, the missing witness doctrine cannot be used to excuse the State’s improper rebuttal closing argument as Robert Cook was not peculiarly under Cook’s control—factor 1; the only explanation for Robert Cook’s absence was evidence elicited by the State that Robert Cook was uncooperative with the police on the day of the incident; and Cook did not testify—factors 2 and 3. *See e.g.* State v. Traweck, *supra* (the defendant did not testify nor call witnesses, and the only issue was the strength of the State’s case; thus reference to defendant’s failure to call witnesses was clearly improper).

above, improperly argued that Cook had subpoena power and could have called his father as a witness forcing Cook to object to this improper shifting of the burden of proof from the State to Cook. While the court sustained Cook's objection, the damage was done—the State rather than responding to Cook's argument that a reasonable doubt existed as to whether he acted knowingly and maliciously given the evidence presented by the State was the testimony of his sister with whom he had an acrimonious relationship (she might be biased against him) improperly focused the jury's attention on why Cook did not call his father to testify to prove his innocence. Such argument was fundamentally prejudicial and should not be condoned by this court.

The court exacerbated the State's misconduct in denying Cook's motion for mistrial. The court denied Cook's motion for mistrial stating in pertinent part:

...In his argument [Defense Counsel] stated, "There was another person who saw this, but for whatever reason, what he was has not been presented to you. He either refused to cooperate or the State chose not to bring him, but Robert Cook saw it." Under the circumstances of raising that argument, I am of the opinion that the argument offered by the prosecutor during her rebuttal was not argument that rises to the level of inappropriateness or prejudice such that a mistrial would be an appropriate remedy. I'm going to deny that motion....

[Emphasis added]. [RP 194].

While the trial court has discretion in determining whether to grant a mistrial or not based on prosecutorial misconduct, a reviewing court will reverse if the trial court abused its discretion. State v. Borg, 145 Wn.2d 329, 335, 36 P.3d 546 (2001). In this case, the trial court did abuse its discretion in failing to grant Cook's motion for a mistrial.

It cannot be disputed that the State's rebuttal closing argument was improper prosecutorial misconduct—the trial court sustained Cook's objection. *See* State v. Cleveland, *supra*; State v. Cheatam, *supra*; State v. Montgomery, *supra*. The trial court abused its discretion in denying Cook's motion for a new trial based on the State's improper rebuttal closing argument in two ways: 1) finding that the misconduct was not so egregious as to warrant a mistrial trial; and 2) somehow that Cook's closing argument mentioning his father in arguing reasonable doubt excused the State committing misconduct and shifting the burden to Cook to prove his innocence.

With regard to the trial court's first reason for denying Cook's motion for a new trial, shifting the burden to a defendant to prove his innocence and arguing that a defendant has a burden of producing evidence violates the very foundation of the criminal justice system and due process. To argue as the State did here, in rebuttal closing argument

at a time where a defendant can speak no more, is a most egregious form of misconduct.

With regard to the trial court's second reason for denying Cook's motion for a new trial, contrary to the trial court's interpretation of Cook's closing argument, Cook was merely arguing reasonable doubt as to the essential element of knowingly and maliciously. The evidence the State had presented as to this element was the testimony of Diane Kelly with whom Cook had an acrimonious relationship not Robert Cook who was also present during the incident. Moreover, it was the State who had elicited that Robert Cook was uncooperative with the police. Given this evidence, Cook was entitled to question whether the State had proved the matter beyond a reasonable doubt.

c. Conclusion.

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). Sadly, this is what has occurred in the instant case. The only issue involved in the instant case was whether Cook had acted knowingly and maliciously in damaging his sister's car. Instead of focusing on the evidence related to this issue, the State by its misconduct

focused the jury on why Cook had not presented evidence proving his innocence in order to improperly obtain a conviction. It cannot be said based on the totality of this record that the jury rendered a verdict that was not based on the State's improper rebuttal closing argument. This court should reverse Cook's conviction

- (2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT COOK WAS GUILTY OF MALICIOUS MISCHIEF IN THE SECOND DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, the State charged and Cook was convicted of malicious mischief in the second degree. [CP 5, 17]. As instructed by the Court in Instruction No. 11, [CP 27; RP 154-155], the State bore the burden of establishing beyond a reasonable doubt the following essential elements:

- (1) That on or about May 25, 2009, the defendant caused physical damage to the property of Diane Kelly in an amount exceeding \$250;
- (2) That the defendant acted knowingly and maliciously; and
- (3) That this act occurred in the State of Washington.

The court further instructed the jury in Instruction No. 8 as to legal definition of knowingly as follows:

A person knows or acts knowingly with respect to a fact or result when he or she is aware of that fact or result. It is not necessary that the person know that the fact or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

[CP 26].

The court also instructed the jury in Instruction No. 9 as to the meaning of the essential element of maliciously as follows:

Malice and maliciously mean an evil intent, wish, or design to vex, annoy or injure another person.

Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.

[CP 26].

It is not disputed that Cook damaged Diane Kelly's car with his truck. What is disputed is whether Cook did so knowingly and maliciously and it is on this essential element that the State cannot establish proof beyond a reasonable doubt.

The Sum of the State's evidence against Cook as to the essential element that he acted knowingly and maliciously is the testimony Troy Orf that Cook was traveling at 10-13 miles per hour at the time of impact with no evidence of braking and more importantly the testimony of Diane Kelly, who testified that Cook (her younger brother) was angry with her yelling at her as soon as he arrived at their father's home, and that he drove his truck forward then reversed ramming into her car after which Cook yelled that maybe know she would leave him alone before driving off. Diane Kelly admitted that her relationship with Cook was pretty much nonexistent.

However, the entire incident can be described as nothing more than an unfortunate accident after a heated encounter between siblings. Even with Diane Kelly's testimony, it cannot establish what was going on in Cook's mind—whether he deliberately damaged her car to vex or annoy her or whether it was an accident during a sibling dispute. Even with Troy Orf's testimony, the fact that Cook was reversing at 10-13 miles per hour when his truck hit his sister's car, again, does not establish what was going on in Cook's mind—he could have been careless in driving away too fast to get a way from his sister with whom he had an acrimonious relationship. In other words the evidence in support of Cook acting knowingly and maliciously also supports Cook, in his anger, merely driving hastily away from his father's home and yelling at his sister in a fit of pique that he had caused an accident and being unwilling to admit the same in that anger. It cannot be said beyond a reasonable doubt that Cook acted knowingly and maliciously when he damaged his sister's car. This court should reverse and dismiss Cook's conviction malicious mischief in the second degree.

- (3) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING WHERE IT APPEARS BASED ON THE RECORD THAT COOK'S OFFENDER SCORE WAS MISCALCULATED.

A sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. State v. McCraw, 127 Wn. 2d 281, 289, 898 P.2d 838 (1995). A challenge to the calculation of an offender score may be raised for the first time on appeal. Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986).

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based on a miscalculated upward offender score, "that a defendant cannot agree to punishment in excess of that which the Legislature has established," and that "in general a defendant cannot waive a challenge to a miscalculated offender score." In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, *citing* State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive

sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Under RCW 9.94A.500(1) effective June 12, 2008, “[a] criminal history summary relating to the defendant from the prosecuting authority...shall be prima facie evidence of the existence and validity of the convictions listed therein.” Cook’s counsel acknowledged that the Prosecutor’s Statement of Criminal History regarding Cook’s prior convictions was accurate, [CP 30; 12-11-09 RP 222], but such an acknowledgement should not be construed as an acknowledgment that Cook’s offender score was accurately calculated. Cook is not challenging the existence or validity of any of his prior convictions; he is challenging the legal implications of those convictions under the requirements of RCW 9.94A.525.

In the instant case, Cook has six prior juvenile convictions for burglary in the second degree all occurring in 1987 all of which are class B felonies pursuant to RCW 9A.52.030; a prior adult conviction for malicious mischief in the second degree occurring in 1989 which is a class C felony pursuant to RCW 9A.48.080; and a prior adult conviction for TMVWOP occurring in 1991 (apparently sentenced in 1993 to 14 days)

which is a class B felony pursuant to RCW 9A.56.070. [CP 30-65]. According to the record, between these convictions and Cook's next conviction (convictions in 2005 for theft in the second degree, malicious mischief in the second degree, and identity theft in the first degree) there was a fourteen-year gap (or a twelve-year gap if using the apparent 1993 sentencing date). [CP 30-65].

This gap between convictions appears to allow for Cook's convictions prior to 2005 to "wash out" from Cook's offender score pursuant to RCW 9.94A.525(2)(b)(c) and (f), which requires prior adult and juvenile class B felonies to "wash out" "if, since the last date of release from confinement...the offender had spent ten consecutive years in the community without committing any crime..."and which requires prior juvenile and adult class C felonies to "wash out" "if, since the last date of release from confinement...the offender had spent five consecutive years in the community without committing any crime..."

While the State in making its sentencing recommendation references Cook's "criminal history, as we discussed, includes 11 felonies, 13 misdemeanors and gross misdemeanors spanning from 1987 to 2009," [12-11-09 RP 223], there is no explanation based on this record as to how the State included Cook's convictions prior to 2005 for purposes of calculating Cook's offender score. Did any of the misdemeanor or gross

misdemeanors mentioned by the State occur during the 12/14-year gap at such a time as to prevent the “wash out” of a class B or a class C felony? All that was required was for the State to put on the record that Cook indeed had a requisite crime that prevented any of Cook’s convictions prior to 2005 from washing out. The State failed to do so requiring that this matter be remanded for resentencing as this court cannot tell based on this record what Cook’s proper offender score in fact should be. *See State v. Mendoza*, 139 Wn. App. 693, 162 P.3d 439 (2007), *affirmed* 165 Wn.2d 913, 205 P.3d 113 (2009).

E. CONCLUSION

Based on the above, Cook respectfully requests this court to reverse and dismiss his conviction and/or remand for resentencing.

DATED this 23<sup>rd</sup> day of July 2010.

*Patricia A. Pethick*  
PATRICIA A. PETHICK  
Attorney for Appellant  
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 23<sup>rd</sup> day of July 2010, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Douglas H. Cook  
DOC# 965613  
Airway Heights Corrections Center  
P.O. Box 2109  
Airway Heights, WA 99001-2109

Jon Skindar  
Thurston County Dep. Pros. Atty.  
2000 Lakeridge Drive SW  
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(and the transcript)

FILED  
COUNTY CLERK  
10 JUL 26 AM 10:07  
STATE OF WASHINGTON  
BY \_\_\_\_\_

Signed at Tacoma, Washington this 23<sup>rd</sup> day of July 2010.

Patricia A. Pethick  
Patricia A. Pethick