

COURT OF APPEALS
DIVISION II

No. 41189-0-II

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ORIGINAL

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

BRIAN DAVID MATTHEWS,
Appellant.

v.

STATE OF WASHINGTON,
Respondent.

Appeal from the Superior Court of Washington at Pierce County
Judge Bryan Chusoff
Judgment No. 99-9-10779-0, Cause No. 98-1-05430-3

BRIEF OF APPELLANT

BRIAN DAVID MATTHEWS
Appellant Pro Per.
796769,
Stafford Creek Corrections Center H-2 A-1
191 Constantine Way
Aberdeen, WA 98520-9504

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to acquire subject matter jurisdiction in this case when the State failed to charge MATTHEWS after vacating the previous judgment in this case until the second day of jury trial.
2. The trial court erred in failing to acquire personal jurisdiction over MATTHEWS when it failed to arraign him until after the State rested its case in chief.
3. The trial court erred by failing to rearraign MATTHEWS on a substantially amended information until after the State rested its case in chief.
4. The trial court erred when it denied MATTHEWS' Motion to Dismiss for failing to prove beyond a reasonable doubt that MATTHEWS was guilty.
5. The trial court erred when it denied MATTHEWS' request for a continuance after the State initiated the action by filing an Amended Information on the second day of jury trial.
6. The trial court erred when it imposed an exceptional sentence based upon its own findings of fact as opposed to those found by the jury.
7. The trial court erred when it imposed an exceptional sentence which is clearly excessive, abusing its discretion.
8. The trial court erred by allowing the State to submit the aggravating factor of abuse of a position of trust to the jury.
9. The trial court erred by allowing the State to submit the aggravating factor of particular vulnerability to the jury.
10. The trial court erred by allowing the State to submit the aggravating factor of deliberate cruelty to the jury.
11. The trial court erred when it allowed MATTHEWS to proceed *pro se*.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State failed to charge MATTHEWS after the previous judgment was vacated, depriving the trial court of subject matter jurisdiction? [Assignment of Error No. 1]
2. Whether the trial court was without personal jurisdiction over MATTHEWS when it failed to arraign him until after the State rested its case in chief? [Assignment of Error No. 2]
3. Whether the trial court was required to rearraign MATTHEWS on a substantially amended information prior to the State resting its case in chief? [Assignment of Error No. 3]
4. Whether the trial court should have dismissed Count I as the State failed to prove beyond a reasonable doubt that MATTHEWS was guilty? [Assignment of Error No. 4]
5. Whether the trial court should have granted MATTHEWS' request for a continuance after the State initiated the action by filing the Amended information on the second day of jury trial? [Assignment of Error No. 5]
6. Whether the trial court's reasons for imposing an exceptional sentence were substantial and compelling or even found by the jury? [Assignment of Error No. 6]
7. Whether the trial court abused its discretion by imposing an exceptional sentence which is clearly excessive? [Assignment of Error No. 7]
8. Whether there was sufficient evidence presented to allow the aggravating factor of abuse of a position of trust to be submitted to the jury? [Assignment of Error No. 8]
9. Whether there was sufficient evidence presented to allow the aggravating factor of particular vulnerability to be submitted to the jury? [Assignment of Error No. 9]
10. Whether there was sufficient evidence presented to allow the aggravating factor of deliberate cruelty to be submitted to the jury? [Assignment of Error No. 10]
11. Whether the trial court should have allowed MATTHEWS to continue to represent himself *pro se*? [Assignment of Error No. 11]

C. STATEMENT OF THE CASE

1. Procedural Facts

On 12/21/1998 the State of Washington (hereinafter “State”) charged BRIAN DAVID MATTHEWS (hereinafter “MATTHEWS”) with one (1) count of Assault of a Child in the First Degree under Cause No. 98-1-05430-3. CP 247. MATTHEWS ultimately entered a guilty plea to a Second Amended Information charging one (1) count of Assault of a Child in the First Degree and one (1) count of Assault of a Child in the Third Degree. CP 266-end. This Second Amended Information did not charge aggravating factors. *Id.*

In 2008 the Court of Appeals Division II held that MATTHEWS’ 1999 guilty plea was unconstitutional and that he was entitled to withdraw said plea. The court remanded to the superior court for further proceedings. See COA # 35437-3-II.

On 08/07/2008, Judge Culpepper entered an *Order* vacating the judgment in Cause No. 98-1-05430-3. CP 20, 21.

After the convictions were vacated, the State did not file charges thereunder until the second day of jury trial - 6/29/2010 - after having picked a jury. VRP 6/29/2010, pg. 46 @ 7-9; CP 64-66, 240-243. MATTHEWS formally objected, asserting that he was “absolutely unprepared” for the amendment and requested “four or five days” to “process the information.” *Id.*, pg. 47 @ 15-20; pg. 48 @ 9-24. MATTHEWS requested formal reading, to which the court

complied. *Id.*, pg. 49 @ 22 - pg. 53 @ 17. The trial court did not arraign MATTHEWS. *Id.*, pg 53 @ 18-20.

After the State rested their case in chief, the trial court accepted the Third Amended Information and attempted to arraign MATTHEWS. VRP 7/7/2010, pg 678 @ 5-22. MATTHEWS attempted to enter a demurrer, and over MATTHEWS' objection the trial court entered a plea of not guilty. *Id.*, pg. 679 @ 22-25, pg. 680 @ 1-8.

The jury subsequently convicted. CP 140-142. MATTHEWS was sentenced to an exceptional sentence of more than twice the amount of any previous exceptional sentence imposed in this matter. VRP 8/13/2010, pg. 860 @ 1-4; CP 160, 229. This appeal timely follows.

2. Substantive Facts.

On or about 8/5/1998, A.E. (being under the age of 18, name withheld) sustained second and third degree burns while under the supervision of MATTHEWS. MATTHEWS was eventually charged with one (1) count of Assault of a Child in the First Degree. CP 247.

In January 1999 the State interviewed Jordan Sears. VRP 7/6/2010, pg. 387 @ 13. Jordan Sears is A.E.'s older brother who was also under the supervision of MATTHEWS when A.E. sustained her injuries. His statement, made in 1999, was corroborated by his testimony at trial eleven (11) years later. Mr. Sears testified that he personally eyewitnessed A.E. tip a Mr. Coffee iced tea

maker over onto herself and identified that incident as the cause of A.E.'s burn injuries. VRP 7/6/2010, pgs. 397, 399, 401, 451, 505, 506, 509.

In addition to calling Mr. Sears as a witness, the State also called Tracey Sears - A.E.'s mother. Ms. Sears testified that when she came home from work on the morning of 8/5/1009, she stepped in a wet spot in the carpet where the tea maker was kept. VRP 7/1/2010, pgs. 251, 328. Ms. Sears testified that the tea maker was cracked and warped, but that it was still functional. *Id.*, pg. 252, 337. Ms. Sears testified that A.E. likes to drink sweet tea and that tea was made often in the household. *Id.*, pg. 330. Ms. Sears testified that A.E. was never afraid of MATTHEWS, even after having sustained injuries. *Id.*, pg. 323, 335, 349. Ms. Sears testified that MATTHEWS never struck A.E. *Id.*, pg. 351.

D. PRESENTMENT

1. The Trial Court Failed to Acquire Subject Matter Jurisdiction in this Case, Its Orders are Void *Ab Initio* 08/07/2008, and It Violated the Time for Trial Provisions of CrR 3.3

It is well settled and long adhered to in Washington Courts that a Superior Court acquires Subject Matter Jurisdiction only when an action is commenced.

Wa. Const. Art. 1 § 25; Daniel v. Daniel, 116 Wash. 82, 198 P. 728 (1921); State v. Sponburgh, 84 Wn.2d 203, 206, 525 P.2d 238 (1974); Marley v. Department of Labor and Industries, 125 Wn.2d 533, 886 P.2d 189 (1994); State v. Corrado, 78 Wash.App 612, 615, 898 P.2d 860 (1995); State v. Barnes, 146 Wn.2d 74, 81, 43 P.3d 490 (2002). In Washington, a criminal prosecution is initiated only at such time as an Information is filed. CrR 2.1(a); State v. Greenwood, 120 Wn.2d 585, 594, 845 P.2d 971 (1993); Corrado, supra at 615. “The law is well-settled that an order entered without jurisdiction is void.” State ex rel. Patchett v. Superior Court, 60 Wn.2d 784; 787, 375 P.2d 747 (1962), cited in Corrado, supra at 615-16; Marley, supra at 541. Jurisdiction can be challenged at any time. Corrado, supra at 615. The burden of proving jurisdiction lies with the State. State v. Daniels, 104 Wn.App 271, 274-75, 16 P.3d 650 (2001) (citing State v. L.J.M., 129 Wn.2d 386, 392, 918 P.2d 898 (1996)). Appellate courts review jurisdiction questions *de novo*. State v. Squally, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997).

Where a defendant is not held in custody pretrial, dismissal of a criminal case with prejudice is required if not brought to trial within ninety (90) days.

Washington State Court Rules, Criminal Rule (CrR) 3.3. The United States Supreme Court has held that when a code scheme expressly requires the government to act within a particular time period and specifies that the consequence for failure to comply is dismissal, the government loses jurisdiction when the time requirement is violated. Brock v. Pierce County, 476 U.S. 253, 106 S.Ct. 1834, 90 L.Ed.2d 248 (1986) (citing St. Regis v. Mohawk Tribe v. Brock, 769 F.2d 37, 41 (2nd Cir. 1985) and Forth Worth National Corp. v. Federal Savings & Loan Insurance Corp., 469 F.2d 47, 58 (5th Cir. 1972)). See also United States v. Hovsepian, 359 F.3d 1144 (9th Cir. 2004); United States v. Dickinson, 21 F.3d 1339 (4th Cir. 1994); and Dolan v. United States, 130 S.Ct. 2533, 2538-41 (U.S. 2010), all relying on Brock's jurisdictional holding.

When analyzing the time for trial rule, Washington Courts have similarly held that when a Superior Court proceeds to trial after a defendant's CrR 3.3 rights have been violated, it acts in excess of jurisdiction. Butts v. Heller, 69 Wn.App 263, 848 P.2d 213 (1993); State ex rel. Rupert v. Lewis, 9 Wn.App 839, 843, 515 P.2d 548 (1973); State v. Epler, 93 Wn.App 520, 524, 969 P.2d 498 (1999) (clear violation of time for trial rule deprives trial court of jurisdiction); State v. Mack, 89 Wn.2d 788, 576 P.2d 44 (1978).

In the instant case, MATTHEWS' prior Judgment under Cause No. 98-1-05430-3 was vacated on, and as of, 08/07/2008. CP 20, 21. The State did not file an Information thereafter until 06/29/2010 when, on the second day of jury trial, it

filed the Third Amended Information. CP 64-66, 240-243. The trial court could only have acquired subject matter jurisdiction as of 06/29/2010.

As a result of acquiring subject matter jurisdiction only as of 06/29/2010, every order made and/or entered between the dates 08/07/2008 and 06/29/2010 is void as the court was without jurisdiction to make and/or enter them. Patchett, *supra* at 787; Corrado, *supra* at 615-16; Marley, *supra* at 541. This is because the Superior Court acquires jurisdiction only at the time an action is commenced (Corrado, *supra* at 615-16; Barnes, *supra* at 81), which is at filing the Information (Greenwood, *supra* at 594; CrR 2.1(a)), and when a trial court acts without jurisdiction such acts are void. Patchett, *supra* at 787; Corrado, *supra* at 615-16.

MATTHEWS' Judgment was vacated on, and as of, 08/07/2008. CP 20, 21. As MATTHEWS was in custody, the State was obligated to file an Information within 72 hours. CrR 3.2.1(f)(1). This would have commenced the action. Greenwood, *supra* at 594; CrR 2.1(a).

As no criminal prosecution was commenced after 08/07/2008, the Superior Court was without jurisdiction. Corrado, *supra* at 615-16; Greenwood, *supra* at 594. Therefore, any order setting a trial date, continuing a trial date, continuing detention, and/or establishing conditions of release are void *ab initio* 08/07/2008 as they are acts of a trial court without jurisdiction. Patchett, *supra* at 787; Corrado, *supra* at 615-16.

Because the previous Judgment was vacated on 08/07/2008, the State had three (3) days (until 08/10/2008) to file charges. CrR 3.2.1(f)(1). The State

would have then had - arguendo - fourteen (14) days (until 08/24/2008) to arraign MATTHEWS (CrR 3.3, CrR 4.1), and would have then had a maximum of ninety (90) days (until 11/23/2008) to bring the case to trial (CrR 3.3), if it had first acquired subject matter jurisdiction. As trial commenced on 06/28/2010, the Superior Court proceeded to trial long after MATTHEWS' CrR 3.3 time for trial rights had been temporally derogated and it thus acted in excess of jurisdiction. Brock, supra; Dolan, supra; Epler, supra; Mack, supra.

Based upon the foregoing, the trial court did not acquire subject matter jurisdiction after vacating the previous Judgment until 06/29/2010, and its Orders between 08/07/2008 and 06/29/2010 are void. As MATTHEWS was not brought to trial (or even formally processed) by 11/23/2008, and because the trial court was without jurisdiction to order continuances in the matter, the trial court violated the time for trial provisions of CrR 3.3. This conviction must be reversed, and the underlying charge dismissed with prejudice. Epler, supra at 524; Mack, supra. MATTHEWS respectfully requests so.

2. The Trial Court Failed to Acquire Personal Jurisdiction Over MATTHEWS Until After the State Rested Its Case in Chief and Every Order Entered Between 08/07/2008 And 07/07/2010 Is Void

It is well settled and long adhered to in Washington Courts that a Superior Court obtains personal jurisdiction over a defendant only when a defendant appears at arraignment, enters a plea, and is present in court on the day of trial. State v. Melvern, 32 Wash. 7, 12, 72 P. 489 (1903); State v. Ryan, 48 Wn.2d 304,

305, 293 P.2d 399 (1956); Ollison v. Rhay, 68 Wn.2d 137, 139, 412 P.2d 111 (1966); State v. Blanchey, 75 Wn.2d 926, 938, 454 P.2d 841 (1969).

“Arrestment consists of ... obtain[ing] his answer to the charge. The defendant’s answer is his plea.” 12 Royce A. Ferguson, Jr., Wa. Practice and Procedure, § 1105, 236 (3d ed. 2004); State v. Eaton, 164 Wn.2d 461, 191 P.3d 1270 (2008).

“The law is well-settled that an order entered without jurisdiction is void.”

Patchett, *supra* at 787; Corrado, *supra* at 615-16. A court enters a void order when it lacks jurisdiction. Marley, *supra* at 541. Jurisdiction can be challenged at any time. Corrado, *supra* at 615. The State bears the burden of proving jurisdiction. Daniels, *supra* at 374-275. This court reviews jurisdiction questions *de novo*. Squally, *supra* at 340. Arrestment means the date on which a plea is entered to the charge. CrR 3.3.

In the instant case, MATTHEWS previous judgment under Cause No. 98-1-05430-3 was vacated on, and as of, 08/07/2008. CP 20, 21. Charges were not filed thereafter until 06/29/2010 when, on the second day of jury trial, the State filed the Third Amended Information. CP 64-66, 240-243. MATTHEWS did not waive formal reading. VPR 6/29/2010, pg. 49 @ 22. Judge Chuscoff formally read the charges. VPR 6/29/2010 pg. 49 @ 23 - pg. 53 @ 17. Judge Chuscoff did not obtain MATTHEWS’ answer (i.e. plea) to the charges, and Judge Chuscoff did not enter a plea on MATTHEWS’ behalf. VPR 6/29/2010, pg. 53 @ 18-20.

Since the trial court did not obtain MATTHEWS’ plea on 6/29/2010 and did not enter on one his behalf, there was not a plea before the Court. Without a

plea of not guilty having been entered, the trial court lacked personal jurisdiction over MATTHEWS. Blanchey, *supra* at 938; Rhay, *supra* at 139; Ryan, *supra* at 305; Melvorn, *supra* at 12. As the trial court lacked jurisdiction over MATTHEWS' person, all orders between 08/07/2008 and 07/07/2010 are void as the trial court was without jurisdiction to make and/or enter them. Patchett, *supra* at 787; Corrado, *supra* at 615-16; Marley, *supra* at 541. This is because the Superior Court acquires personal jurisdiction over a defendant when he pleads not guilty at arraignment and is present at trial (Blanchey, *supra* at 738; Rhay, *supra* at 139; Ryan, *supra* at 305; Melvorn, *supra* at 12), and when a trial court acts without jurisdiction such acts are void. Patchett, *supra* at 787; Corrado, *supra* at 615-16; Marley, *supra* at 541.

Additionally, Washington Laws of 1999 c 349 § 1 *et seq.*, as amended [codified at RCW 9A.04.030(1)] did not confer personal jurisdiction over MATTHEWS to the trial court, as that law sets forth the State's jurisdiction to punish. "Under the Due Process clause, a [pretrial] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. See Ingraham v. Wright, 430 U.S. 651, 674 (1977); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-167, 186 (1963); Wong Wing v. United States, 163 U.S. 228, 237 (1896)." Bell v. Wolfish et al., 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). As MATTHEWS was a *de facto* pretrial detainee, and the State had not secured a formal adjudication of guilt in accordance with due process of law, the

State hadn't acquired the power to punish. Ingraham, supra at 671-72, n.40. The laws codified at RCW 9A.04.030(1) *et seq.* do not apply to this issue.

Based upon the foregoing, the trial court completely lacked personal jurisdiction over MATTHEWS from 08/07/2008 through the State's resting its case in chief on 07/07/2010, and was without authority to enter orders over and/or regarding him. The conviction was obtained without the trial court having first acquired personal jurisdiction - in violation of the due process clauses of the State and Federal Constitutions - and must be reversed with the underlying charge being dismissed with prejudice. MATTHEWS respectfully requests so.

3. The Third Amended Information Constituted a Substantial Amendment Requiring ReArrestment; Because ReArrestment Occurred After the State Rested Its Case in Chief, It Violated the Pelkey Rule

It is well-settled law in Washington courts that a substantial amendment of an Information requires rearrestment. State v. Hurd, 5 Wash.2d 308, 312, 105 P.2d 59 (1940); State v. Pissaro, 14 Wash.App 217, 218, 540 P.2d 447 (1975); State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001). Rearrestment must be had if the defendant demands it. State v. Tatum, 61 Wn.2d 576, 579, 379 P.2d 372 (1963). "Arrestment consists of ... obtain[ing] his answer to the charge. The defendant's answer is his plea." Eaton, supra. A substantially amended Information is one which provides for a change in statutory basis. Hurd, supra at 313; Pissaro, supra at 218. The court may permit the State to amend the

information at any time if substantial rights of the defendant are not prejudiced. CrR 2.1(d). Once the State has rested, however, Washington courts have held that any amendment other than an amendment to a lesser charge is a *per se* violation of the defendant's constitutional rights. State v. Vangerpen, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). This is known as the "Pelkey Rule." Courts review a ruling on a Motion to Amend for abuse of discretion. State v. James, 108 Wn.2d 483, 490, 739 P.2d 699 (1987).

Under the United States and Washington Constitutions, a defendant must be informed of the accusation against him and cannot be convicted of a crime not charged. State v. Taylor, 140 Wn.2d 229, 236, 996 P.2d 571 (2000); State v. Carr, 97 Wn.2d 436, 429, 645 P.2d 1098 (1982). "In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusations." U.S. Const. Amendment VI. "In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him, [and] to have a copy thereof." Wa. Const. Art. 1 § 22. The State must charge any aggravating factor by Information which it intends to prove for purposes of seeking an exceptional sentence above the standard range. State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009).

In the instant case, MATTHEWS' previous Judgment under Cause No. 98-1-05430-3 was vacated on, and as of, 08/07/2008. CP 20, 21. Twenty-two (22) months thereafter, the State filed a Third Amended Information on the

second day of jury trial. CP 64-66, 240-243. This Amended Information added three (3) aggravating factors which the State intended to prove for purposes of seeking an exceptional sentence above the standard range; and it also added an alternative means of committing the underlying assault charge. Neither the aggravating factors nor the alternative means were alleged in the original Information filed on 12/21/1998. CP 247.

As this amendment constituted a substantial amendment, rearraignment was necessary. Hurd, supra at 312; Pisauro, supra at 218. This is because there was a change in statutory basis: the Amended Information added allegations of aggravating factors, to wit: RCW 9.94A.535(3)(n), RCW 9.94A.535(3)(b), RCW 9.94A.535(3)(a).

Yet in this case, MATTHEWS was not formally rearraigned as he did not enter a plea nor did the court enter one on his behalf. VRP 06/29/2010, pg. 49 @ 23 - pg. 53 @ 20. MATTHEWS did not waive rearraignment; he specifically requested formal reading of this Amended Information. VRP 06/29/2010, pg. 49 @ 22. In fact, when the issue of non-arraignment was raised, Judge Chuscoff and MATTHEWS had the following colloquy:

“THE COURT: Mr. MATTHEWS.

THE DEFENDANT: Judge, briefly, I don't know if this is an opportune time to do it, but with regards to the third or fourth Amended Information that was filed, I would have to object formally to not arraign[ing] me thereupon. I don't even know if that is even appropriate, but I just feel compelled to do it.

THE COURT: That you weren't arraigned on those? We read you the Information.

THE DEFENDANT: Okay.

THE COURT: Did you not enter -- as far as I was concerned, a plea of not guilty was entered.

THE DEFENDANT: That's what I'm saying. Maybe I'm mistaken. I don't know. Maybe I'm mistaken. I don't know. I apologize.

THE COURT: I will grant the amendment now. Do you want to enter a plea of guilty or not guilty to the Third Amended Information?"

VRP 07/07/2010, pg. 678 @ 5-22. It is not until the afternoon of 07/07/2010 that MATTHEWS was rearraigned on this substantially amended Information. *Id.* However, the State rested its case in chief on the morning of 07/07/2010. VRP 07/07/2010, pg. 648 @ 6.

As Judge Chuschoff accepted the Third Amended Information and entered a plea of not guilty (over MATTHEWS' noted objection) thereupon after the State rested its case in chief, the amendment then violates the Pelkey rule and is a *per se* violation of MATTHEWS' secured rights under the federal and state constitutions. Vangerpen, supra at 789; Pelkey, supra at 491; Wa. Const. Art. I §§ 3, 22; U.S. Const. Amend. VI. This is because the Third Amended Information was not to a lesser charge but instead charged four (4) additional statutory provisions regarding the underlying assault charge, three (3) of which served to enhance the potential punishment involved.

Because the Third Amended Information constituted a substantial amendment, arraignment was necessary. Hurd, supra at 312; Pisauro, supra at 218. The trial court violated MATTHEWS' rights secured under the federal and state constitutions (U.S. Const. Amend. VI; Wa. Const. Art. 1 § 22) when it failed to arraign him on the Third Amended Information prior to the State resting its case in chief. Hurd, supra at 312; Pisauro, supra at 218; Woods, supra.

Because the trial court accepted the Third Amended Information and entered a plea of not guilty thereupon after the State rested its case in chief, the amendment then violates the Pelkey Rule and constitutes a *per se* violation of MATTHEWS' constitutionally secured rights aforementioned. Vangerpen, supra at 789; Pelkey, supra at 491.

Based upon the foregoing, this conviction was obtained in violation of both federal and state constitutions and must be reversed and the underlying charge dismissed with prejudice. MATTHEWS respectfully requests so.

4. The State Failed to Prove Beyond a Reasonable Doubt that MATTHEWS was Guilty, Requiring Reversal

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The court interprets statutes *de novo*. Morgan v. Johnson, 137 Wn.2d 887, 891, 976 P.2d 619 (1999). The court

reviews questions of law *de novo*. State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006).

In Washington, “Assault” is defined by common law. While three definitions are recognized in Washington, only the second such definition applies to this case: “(2) an unlawful touching with criminal intent [actual battery];” State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) (citing State v. Bland, 71 Wn.App 345, 353, 860 P.2d 1046 (1993), quoting State v. Walden, 67 Wn.App 891, 893-94, 841 P.2d 81 (1992)). Specific intent cannot be presumed. Wilson, *supra* at 217. “Intent exists only if a known or expected result is also the actor’s objective or purpose.” State v. Caliguri, 99 Wn.2d 501, 506, 664 P.2d 466 (1983). A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime. WPIC Criminal, 10.01; Laws of 1975 1st ex. s. c 260 § 9A.08.010 [codified at RCW 9A.08.010(a)]. “Evidence of intent ... is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.” State v. Ferreira, 69 Wn.App 465, 468, 850 P.2d 541 (1993) (quoting State v. Woo Won Choi, 55 Wn.App 895, 906, 781 P.2d 505 (1989) *review denied* 114 Wn.2d 1002 (1990), as quoted in Wilson, *supra* at 217.) A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation. WPIC

Criminal, 10.03; Laws of 1975 1st ex. s. c 260 § 9A.08.010 [codified at RCW 9A.08.010(1)(c)]. Great bodily harm is “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” Wilson, supra at 217; Laws of 1988 c 158 § 11 [codified at RCW 9A.04.110(4)(c)].

If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Retrial following reversal for insufficient evidence is unequivocally prohibited and dismissal is the remedy. *Id.*

In the instant case, the State failed to present evidence sufficient to prove the element of intent which - primarily and/or in the alternative - is an essential element of the crimes alleged against MATTHEWS in Count I.

Under a literal interpretation of RCW 9A.36.120(1)(a) and RCW 9A.36.011(1)(c), as alleged primarily, in order for the State to prove that MATTHEWS is guilty of assault of a child in the first degree it would have to prove that MATTHEWS, over the age of 18, with intent to inflict great bodily harm, assaulted A.E., being under the age of 13, and caused great bodily harm. The *mens rea* of this crime is the “intent to inflict great bodily harm.” As alleged here, assault of a child in the first degree requires a specific intent, to wit: to inflict great bodily harm. Accord Wilson, supra at 218.

As such, the State would have to present evidence sufficient to prove, in pertinent part, that MATTHEWS committed an unlawful touching - with the known or expected result of inflicting bodily injury which creates a probability of death or which causes a significant serious permanent disfigurement being the underlying “objective or purpose” - against A.E.

Under a literal interpretation of RCW 9A.36.120(1)(b)(i), in order for the State to prove that MATTHEWS is guilty of assault of a child in the first degree it would have to prove that MATTHEWS, over the age of 18, intentionally assaulted A.E., being under the age of 13, and recklessly inflicted great bodily harm. Under this alternative means, the pertinent elements the State had to prove were: 1) an intentional assault; and 2) reckless infliction of great bodily harm. The *mens rea* of this crime is an “intentional assault.”

As such, the State would have to present evidence sufficient to prove, in pertinent part, that MATTHEWS committed an unlawful touching knowing of and disregarding a substantial risk that the assault would cause great bodily harm.

At trial, there was no evidence presented that MATTHEWS committed any affirmative act and/or action against A.E. which constitutes an assault. In fact, the State called Jordan Sears to the stand, and his testimony absolves MATTHEWS of any intent whatsoever.

Jordan Sears is A.E.’s older brother. On the night of 8/4/1998, he was also at the site of A.E.’s injury sustainment. His testimony was that of an 18 year old

young man recalling what he personally witnessed 11 years prior when he was only seven years old.

Jordan Sears testified that he personally witnessed A.E. burn herself by pulling a Mr. Coffee tea-maker over onto herself while it was brewing tea. VRP 7/6/2010, pgs. 397, 399, 401, 505, 506, 509. Mr. Sears repeatedly stated that he couldn't remember exactly the minute details surrounding the event from 11 years past, yet does recall the incident itself where his baby sister burned herself. *Id.*, pgs. 400, 456, 486, 488, 509. Mr. Sears steadfastly maintained that he was not coached as to what he should say he saw, and firmly held that he was testifying truthfully to the matter to the best of his recollection as to what he personally witnessed. *Id.*, pgs. 438, 456, 464, 486, 488, 508, 509.

The State also called Tracey Sears to the stand. Tracey Sears is A.E.'s mother, who was at work on the night of A.E.'s injuries. Ms. Sears' testimony encompassed that on the morning of 8/5/1998, when she came home from work, she took her shoes off at the door, and as she walked into the house she stepped in a wet spot on the carpet where the tea maker was usually kept. VRP 7/1/2010, pgs. 251, 328. Ms. Sears testified that the tea-maker was cracked and warped, but still functional. *Id.* pgs. 252, 337. Ms. Sears testified that A.E. liked to drink sweet tea and that tea was made often in the household. *Id.*, pg. 330. Ms. Sears testified that A.E. was not afraid of MATTHEWS; that A.E. gave MATTHEWS kisses a lot, even after having sustained her injuries; that MATTHEWS held A.E. at the hospital where she was being treated for her burn injuries and A.E. did not

appear afraid of MATTHEWS. *Id.*, pgs. 323, 335, 349. Ms. Sears testified that MATTHEWS never struck A.E., and that there were no red flags raised by MATTHEWS' actions nor by the other children in the home that MATTHEWS had ever abused A.E. *Id.*, pgs. 351, 352, 355. Ms. Sears testified that she would not lie for MATTHEWS, would not lie to the jury to help MATTHEWS out, and in fact did not love MATTHEWS. *Id.*, pgs. 338, 339.

In short, there was absolutely no testimony or evidence presented that MATTHEWS committed an assault upon A.E. No one testified that they witnessed MATTHEWS assault A.E., or that they heard him assault A.E., or that he ever confessed to assaulting A.E. There was direct testimony that MATTHEWS did not assault A.E. and did not cause A.E.'s burn injuries - by Jordan Sears. The State even told the jury that Jordan Sears' integrity was not an issue. VRP 7/8/2010, pg. 729 @ 17. Mr. Sears testified that he witnessed his baby sister pull the tea-maker over onto herself and burn herself. VRP 7/6/2010, pgs. 397, 399, 401, 451, 505, 506, 509. Tracey Sears testified to stepping in a wet spot where the tea-maker was usually kept on the morning of 8/5/1998, and that A.E. liked MATTHEWS and wasn't afraid of him even after she sustained these burn injuries, and that MATTHEWS never struck A.E. VRP 7/1/2010, pgs. 251, 323, 328, 335, 349, 351.

Based upon the foregoing, the State failed to prove the element of intent, an essential element under either of the alternative theories alleged by the State in Count I. This is because, under the primary allegation, there is insufficient

evidence to prove that MATTHEWS acted with the objective or purpose to accomplish a result which constitutes a crime. Caliguri, supra at 506; Wilson, supra at 218. This is also true regarding the alternative allegation, as there is insufficient evidence of intent to be gathered from all of the circumstances of the case presented (Ferreira, supra at 468; Woo Won Choi, supra at 906; Wilson, supra at 217) to prove that MATTHEWS committed an unlawful touching upon A.E. which recklessly inflicted great bodily harm. As such, Count I must be vacated and the underlying charge dismissed with prejudice. Hickman, supra at 103. MATTHEWS respectfully requests so.

5. The Trial Court Committed Reversible Error When It Denied MATTHEWS' Request for a Continuance After the State Filed an Amended Information on the Second Day of Jury Trial

It is well-settled law in Washington courts that a defendant's substantive rights are prejudiced when the court denies their request for a continuance after an amendment of the charges on the day of trial. State v. Purdom, 106 Wn.2d 745, 748, 725 P.2d 622 (1986); State v. Brown, 74 Wn.2d 799, 801, 447 P.2d 82 (1968); State v. Hockaday, 144 Wn.App 918, 189 P.3d 1273 (2008). Under the federal and state constitutions, a defendant must be informed of the accusation against him. Taylor, supra at 236. "In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation." U.S. Const. Amend. VI. "In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him, [and] to have a copy thereof."

Wa. Const. Art. 1 § 22. A defendant who is misled or surprised by an amended information is entitled to a continuance to prepare. State v. LaPierre, 71 Wn.2d 385, 388, 428 P.2d 579 (1967). A criminal prosecution is initiated when an information is filed. Greenwood, supra at 594; CrR 2.1(a). Courts review a trial court's refusal to grant a continuance for abuse of discretion. State v. Campbell, 78 Wn.App 813, 820, 901 P.2d 1050, *review denied* 128 Wn.2d 1004 (1995).

In the instant case, MATTHEWS' Judgment under Cause No. 98-1-05430-3 was vacated on, and as of, 08/07/2008. CP 20, 21. The State did not file charges thereafter until 06/29/2010, the second day of jury trial in this case. CP 64-66, 240-243. When asked if there was an objection to the amendment, MATTHEWS responded:

“THE DEFENDANT: Yes, Judge. At this time, I'm absolutely unprepared for the Amended Information. We just picked a jury. It brings forth language from 1998, and I'm totally unprepared for this. Absolutely unprepared for this.”

VRP 6/29/2010, pg. 47 15-20. When the trial court asked how MATTHEWS was unprepared for the amendment, MATTHEWS responded:

“THE DEFENDANT: I have only [had] about three minutes, Judge. I am still trying to process this. I haven't had any type of time whatsoever to really confer with stand-by counsel on this.

THE COURT: How much time do you need?

THE DEFENDANT: Four or five days. I don't know.

THE COURT: I don't think you need five days to figure this out. This is pretty simple.

THE DEFENDANT: I would at least like a period of time to at least process the information.

THE COURT: Well, I will give you a few minutes to talk to Mr. Renda here. We will be at recess for just a couple of minutes. We will be back in a few."

VRP 6/29/2010, pg. 48 @ 9-24. Here, MATTHEWS' previous judgment was vacated on 08/07/2008. No charges were filed thereafter until 06/29/2010, approximately 22 months later, when, on the second day of jury trial, the State filed a Third Amended Information which - substantively - would have initiated this criminal prosecution.

As MATTHEWS had been neither charged nor arraigned after his previous judgment was vacated on 08/07/2008, he was "totally" and "absolutely" unprepared for these charges as this amendment was the commencement of the action. Greenwood, supra at 594; CrR 2.1(d); VRP 06/29/2010, pg. 47 @ 15-20. The trial court's denial of MATTHEWS' request for a period of time (four or five days) to process the information violated MATTHEWS' constitutional rights to be informed of the accusations against him. Taylor, supra at 236; U.S. Const. Amend. VI; Wa. Const. Art. 1 § 22. As MATTHEWS objected, stating that he was totally and absolutely unprepared for the amendment, he was surprised and as such was entitled to the continuance he requested in order to prepare. LaPierre, supra at 385.

Based upon the foregoing, the conviction must be reversed. MATTHEWS respectfully requests so.

6. MATTHEWS' Exceptional Sentence Was Imposed for Reasons Which Were Neither Substantial and Compelling Nor Found By the Jury and Must Be Reversed

A trial court may impose a sentence only as authorized by law. In re Personal Restraint of Tobin, 165 Wn.2d 172, 196 P.3d 670 (2008). The U.S. Constitution's Sixth Amendment requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The State must charge any aggravating factor by Information which it intends to prove for purposes of seeking an exceptional sentence above the standard range. Powell, supra at 672 *et seq.* RCW 9.94A.535(3) *et seq.* provides an exclusive list of aggravating factors for purposes of imposing an exceptional sentence above the standard range. RCW 9.94A.535 requires a finding by the jury of said enumerated aggravating factors therein. A defendant may challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.2d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). An exceptional sentence imposed under RCW 9.94A.537 is reviewable under and pursuant to RCW 9.94A.585.

A court may impose an exceptional sentence outside the standard range if it finds substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.537(6). But the jury must determine the factual basis for the aggravating circumstances, and the trial court is “left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence.” State v. Suleiman, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006).

An exceptional sentence is reversible if the record does not support the reasons supplied by the sentencing court, the reasons stated do not support an exceptional sentence, or the sentence imposed was clearly too excessive or too lenient. Suleiman, supra at 291, n.3 (citing RCW 9.94A.585(4)(a) and(b)). Courts review an exceptional sentence under a modified 3-prong analysis: 1) whether the record supports the jury’s special verdict on the aggravating circumstances; 2) Review *de novo* whether the trial courts reasons for imposing the exceptional sentence are substantial and compelling; and 3) whether the trial court abused its discretion by imposing a sentence that is clearly excessive. State v. Hale, 146 Wn.App 299, 306-07, 189 P.3d 829 (2008), citing State v. Fowler, 145 Wn.2d 400, 405-06, 38 P.3d 355 (2002).

In the instant case, in imposing its exceptional sentence, the trial court based its decision on its own findings that MATTHEWS is a heartless, lying, manipulative, anti-social, pathetic, morally corrupt, dangerous person. VRP

8/13/2010, pg. 855 @ 11-19; pg. 858 @ 8-20. The trial court found these assessments to be factual. *Id.*, pg. 859 @ 19-25.

The jury returned a special verdict finding aggravating factors of abuse of position of trust, particular vulnerability and deliberate cruelty. CP 142; VRP 8/13/2010, pg. 844 @ 21-25, pg. 845 @ 1-4. The State requested an exceptional sentence premised upon these findings. *Id.*

However, the trial court took exception with the fact of the State's reasons. *Id.*, pg. 854 @ 9-15. The trial court departed from the analysis that the State presented. *Id.*, pg. 855 @ 9-10. The trial court found that MATTHEWS "is a much more dangerous person than we would have realized then. That's why I agree with Ms. McGaha in substantial measure that this justifies a much more significant penalty." *Id.*, pg. 858 @ 8-13. The trial court further stated:

"THE COURT: I do think Mr. MATTHEWS is completely dangerous to everybody because there is nothing -- there is no limit to what he will do in his own self-interest. That makes him a very dangerous person. Once more, he has a clearly corrupt moral character, which means whatever he wants to do is often something that is illegal and dangerous to the rest of us. I thought about this carefully, about what the State has asked for in terms of a 50-year sentence here."

VRP 8/13/2010, pg. 858 @ 14-23. The trial court also noted:

"I do think it is important that the sentence not be seen to be the product of passion. I have said some harsh things about Mr. MATTHEWS. I don't say them because I am emotionally engaged

in this on some level that is inappropriate. I say it because I think it is absolutely factual and that's what the problem is with Mr. MATTHEWS and that's why he is so dangerous. So in thinking this through, it seems to me that I will not impose the sentence that the State has asked. I will make it 540 months, not 600."

Id., pg. 859 @ 19-25, pg 860 @ 1-4. The trial court did not base its imposition of a precisely enumerated 540 month sentence on the aggravating factors found by the jury, as requested by the State. The record is clear that the trial court independently determined the factual basis of MATTHEWS' being a "dangerous person" as the justification for imposing its precisely enumerated exceptional sentence. *Id.*, pg. 858 @ 8-13.

Yet, "dangerous person" is not an aggravator under RCW 9.94A.535(3)'s exclusive list of sentencing aggravating factors. Even if it had been, the State did not charge MATTHEWS with it by Information (Powell, supra), nor did the jury return with such a verdict so finding. Suleiman, supra at 290-91. The trial court's reliance on its own factual findings fails to constitute substantial and compelling reasons for imposing its precisely enumerated 540 month exceptional sentence, contrary to law. RWC 9.94A.537(6); RCW 9.94A.535 *et seq.*; Suleiman, supra at 290-91; Powell, supra; Blakely, supra; U.S. Const. Amend. VI; Wa. Const. Art. I § 21-22.

Because the trial court relied on its own facts instead of those found by the jury, the reasons for imposing this exceptional sentence were not substantial and

compelling. RCW 9.94A.537(6). This is because the jury, and not the trial court, must determine the factual basis for the aggravating circumstances, and the trial court is “left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence.” Suleiman, supra at 290-91. As the trial court did not conclude that the facts alleged and found by the jury were substantial and compelling to warrant this exceptional sentence, the trial court committed error; it violated RCW 9.94A.535 and RCW 9.94A.537(6), U.S. Const. Amend. VI, and Wa. Const. Art. 1 § 21, and this exceptional sentence must be reversed under RCW 9.94A.585(4)(a).

Based upon the foregoing, this exceptional sentence must be reversed and vacated. MATTHEWS respectfully requests so.

7. The Trial Court Abused Its Discretion by Imposing a Sentence That Is Clearly Excessive and Must be Reversed

Appellate courts review a trial court’s imposition of an exceptional sentence to determine if it is clearly excessive; if so, the sentence is an abuse of discretion. State v. Bluehorse, No. 38328-4-II (published opinion, 01/19/2011) (citing Hale, supra at 308); RCW 9.94A.585(4)(b). The trial court may exercise its discretion to determine the precise length of the exceptional sentence appropriate on a determination of substantial and compelling reasons, supported by the jury’s aggravating factor finding. Bluehorse, supra (citing State v. Kolesnik, 146 Wn.App 790, 805, 192 P.3d 937 (2008), *review denied* 165 Wn.2d

1050 (2009)). “A clearly excessive sentence is one that is clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.” Kolesnik, supra at 805 (emphasis omitted) (quoting State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1308 (1995)).

Here, the trial court failed to base its imposition of this exceptional sentence on substantial and compelling facts based on the jury’s special verdict finding aggravating factors of abuse of position of trust, particular vulnerability and deliberate cruelty. Instead, the precise length of this exceptional sentence - 540 months - was clearly based on the trial court’s finding factually that MATTHEWS is a “dangerous person” (VRP 8/3/2010, pg. 859 @ 19-25), and that because MATTHEWS is a dangerous person, that justifies the imposition of this exceptional sentence. *Id.*, pg. 858 @ 8-13. The exceptional sentence imposed is clearly based upon untenable reasons, constituting an abuse of discretion and as such is clearly excessive. This is because the facts found by the trial court were neither charged by Information nor found by the jury. As the trial court failed to base its imposition of this exceptional sentence on substantial and compelling facts based on the jury’s special verdict aggravating factors, its decision was based on facts which do not meet the requirements of the correct standard for imposing an exceptional sentence. RCW 9.94A.535 *et seq.*; RCW 9.94A.537(6). Said decision is thus based on untenable reasons. See In re Marriage of Littlefield, 133 Wn.2d 339, 46-47, 940 P.2d 1362 (1997). Being based on untenable reasons, the decision imposing this exceptional sentence is an

abuse of discretion, and the exceptional sentence stemming from said discretion abused is clearly excessive. Littlefield, supra at 46-47; Kolesnik, supra at 805. This exceptional sentence must be reversed under RCW 9.94A.585(4)(b).

Based upon the foregoing, the exceptional sentence must be reversed and vacated. MATTHEWS respectfully requests so.

8, 9, 10. The Record Does Not Support the Jury's Special Verdict on the Three (3) Aggravating Factors And the Exceptional Sentence Must Be Reversed and Vacated

Appellate courts review whether the record supports the jury's special verdict on aggravating circumstances. As this is a factual inquiry, the jury's decision will be reversed if it is clearly erroneous. Hale, supra (citing Fowler, supra at 406). An exceptional sentence is reversible if the record does not support the reasons supplied by the sentencing court. Suleiman, supra at 291, n.3. An exceptional sentence imposed under RCW 9.94A.537 is reviewable under and pursuant to RCW 9.94A.585(4). RCW 9.94A.585(5) provides that review thereunder shall be solely on the record before the sentencing court and that briefs shall not be required.

MATTHEWS asserts Jury Instructions 19-23 are not supported by the record. CP 131-135.

Upon reviewing the record in this matter (VRPs 06/29/2010, 06/30/2010, 07/01/2010, 07/06/2010, and 07/07/2010) the jury's special verdict finding

aggravating factors are not supported. The exceptional sentence must be reversed and vacated. Hale, supra. MATTHEWS respectfully requests so.

11. The Trial Court Erred When it Allowed MATTHEWS to Proceed Pro Se

Appellate courts review a trial court's grant of a Motion to Proceed Pro Se for an abuse of discretion. State v. Modica, 136 Wn.App 434, 442, 149 P.3d 446 (2006), *aff'd* 164 Wn.2d 83, 186 P.3d 1062 (2008). The constitutional right to proceed pro se without counsel is guaranteed to a criminal defendant by both Wa. Const. Art. 1§ 22 and U.S. Const. Amend. VI. See Faretta v. California, 442 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right to proceed pro se must be affirmatively requested by the defendant and, when viewed in the context of the record as a whole, the request must be unequivocal. State v. Luvene, 127 Wn.2d 690, 9698-99, 903 P.2d 960 (1995). A defendant who wishes to waive their right to counsel must do so unequivocally. Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989). "If [the defendant] equivocates, he is presumed to have requested the assistance of counsel." Adams, supra at 1444.

No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues. Laws of 1974 ex. s. c 198 § 5 [codified at RCW 10.77.050]. A different standard of mental competency applies when considering a defendant's request to proceed pro se versus a defendant being competent to stand trial at all. Indiana v. Edwards, 554

U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008); United States v. Ferguson, 560 F.3d 1069 (9th Cir. 2009).

The State is permitted to insist upon representation by counsel for those competent enough to stand trial but are not competent enough to conduct trial proceedings by themselves. Edwards, supra at 2387-88. Due Process requires a trial court to hold a competency hearing *sua sponte* whenever the evidence before it raises a reasonable doubt whether a defendant is mentally competent. United States v. Mitchell, 502 F.3d 931, 986 (9th Cir. 2007) (citing Miles v. Stainer, 108 F.3d 1109, 1112 (9th Cir. 1997)). See also State v. Marshall, 144 Wn.2d 266, 27 P.3d 192 (2001).

In the instant case, when viewing the context of the record as a whole, MATTHEWS' request to proceed pro se can neither be said to have been unequivocal, nor can it be said that MATTHEWS was competent to have proceeded pro se.

Starting with MATTHEWS' first appearance before the trial court, literally every answer to the court's inquiries were "I'm not sure," or "I don't know." VRP 01/29/2010. When then stand-by counsel was questioned regarding MATTHEWS' mentality, he informed as follows:

"I would not say that he is free from mental defect. I would say that at least up until now, Western State has found him competent, but I have observed this behavior on several occasions as well as the other behavior described by the State."

VRP 01/29/2010, pg. 12 @ 18-24. Judge Chuscoff finds MATTHEWS' "I don't know" answers equivocal. VRP 01/29/2010, pg. 14 @ 8-10. Judge Chuscoff then talks about the court being able to decide if the defendant may not be competent to represent himself even if he is competent to stand trial, and he instructed counsel to look into the issue. VRP 01/29/2010, pg. 17 @ 5-15.

On 02/12/2010, Judge Chuscoff again talked about the Edwards issue and the trial court's ability to take pro se status away. VRP 02/12/2010, pg. 5 @ 3-15. Stand-by counsel reported that the court does have discretion to remove the pro se tag and appoint counsel if the court has concerns of the defendant's mentality. VRP 02/12/2010, pg. 7 @ 17-25, pg. 8 @ 1-6. Judge Chuscoff stated that he was going to have to revisit the issue of MATTHEWS' representing himself. VRP 02/12/2010, pg. 21 @ 25, pg. 26 @ 1-5.

On 4/16/2010, MATTHEWS did not identify himself as MATTHEWS during the entire proceeding. He refused to accept and/or consent that MATTHEWS was his name. VRP 4/16/2010. MATTHEWS identified himself as a vessel. *Id.*, pg. 7-8. MATTHEWS identified himself as a Washington Corporation. *Id.*, pg. 4 @ 19-20; pg. 7 @ 21-22; pg. 7 @ 25; pg. 8 @ 1-4. MATTHEWS stated that he was going to have to file a complaint with the Federal Trade Commission for the State's violating the Fair Debt Collection Practices Act by refusing to validate and/or verify debt or claim upon written request. *Id.*, pg. 9 @ 19-24. Stand-by counsel stated his belief that MATTHEWS was not competent to act as his own attorney (*Id.*, pg. 10 @ 17-18); that he had serious

concerns about MATTHEWS' mental health (*Id.*, pg. 10 @ 24-25); that he believes MATTHEWS is not in a position to proceed pro se (*Id.*, pg. 10 @ 1-3); and he believed there were outstanding mental health issues. *Id.*, pg. 10 @ 15-17.

On 5/11/2010, MATTHEWS expressed to Judge Chusoff, "THE DEFENDANT: I don't know what I'm doing. I'm a business man; I'm not a lawyer. I don't know." VRP 5/11/2010, pg. 7 @ 13-14. On 7/1/2010, during trial, MATTHEWS told the court that he believed he was in a year prior to the year 2010. VRP 7/1/2010, pg. 203 @ 11-12. MATTHEWS told the court that he doesn't believe the proceeding is real. *Id.*, @ 23-25. MATTHEWS told the court that it's all a figment of his imagination. *Id.*, pg. 204 @ 3-5. MATTHEWS told the court the entire proceeding was a show, and that "we are not in the year 2010." *Id.*, pg. 205 @ 1-3. MATTHEWS tells the court that the year isn't 2010, and that the alleged incident hasn't even existed yet, and that he's being prosecuted for something that hasn't even transpired. *Id.*, @ 7-10. MATTHEWS states that he states his sincere beliefs. *Id.*, pg. 206 @ 4-6. When asked if he was going to continue his representation, MATTHEWS states: "If you force me to..." *Id.*, @ 7-10.

On 7/6/2010, MATTHEWS identified Bill Clinton as the president. VRP 7/6/2010, pg. 384 @ 5-7.

Viewed as a whole, the record is chock full of instances in which MATTHEWS equivocates his request to proceed pro se, and the record clearly delineates numerous instances in which MATTHEWS' competency could be

reasonably doubted. Because of the equivocation, MATTHEWS was presumed to have requested the assistance of counsel. Adams, supra at 1444; Luvene, supra at 698-99. Because of the numerous instances in which MATTHEWS' competency could be reasonably doubted, the court was required to hold a competency hearing *sua sponte*. Mitchell, supra at 986; Stainer, supra at 1112; Wa. Const. Art. 1 § 3; U.S. Const. Amend. VI; Marshall, supra.

Yet in this case, there wasn't a competency hearing held at all. Not only was MATTHEWS never evaluated to proceed pro se, he was never evaluated as to competency to have stood trial. Given the numerous times that the Edwards issue was discussed, and given the numerous circumstances of odd behavior and conduct had during proceedings before the trial court, the trial court abused its discretion when it allowed MATTHEWS to proceed pro se; at a minimum some type of a competency hearing should have been held.

Based upon the foregoing, this court must reverse and remand back to the trial court for a new trial. MATTHEWS respectfully requests so.

E. CONCLUSION

Based upon the foregoing, MATTHEWS respectfully requests this Court to reverse and dismiss his conviction with prejudice. In the alternative, MATTHEWS respectfully requests this court to reverse and vacate his exceptional sentence and remand to the trial court with instructions to impose a standard range sentence. In the extreme alternative, MATTHEWS respectfully requests this court to reverse his convictions and remand to the trial court for a new trial.

Respectfully submitted on MAY 11th, 2011.

WITH ALL RIGHTS RESERVED,

BRIAN DAVID MATTHEWS

BRIAN DAVID MATTHEWS,
Appellant Pro Per.
Process Server Registration
No. 11-0315-07

DECLARATION OF SERVICE BY MAIL

GR 3.1

I, BRIAN DAVID MATTHEWS, declare and say:

ORIGINAL

That on the 12 day of MAY, 2011, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, with First Class U.S. Mail, pre-paid postage affixed, under cause No. 41189-0-II:

- * Brief of Appellant
- * VRP's (to Prosecutor only)
- * Declaration of Service by Mail GR 3.1

addressed to the following:

* Washington State
 Court of Appeals Div II
 950 Broadway
 Ste. 300
 Tacoma WA 98402

* Pierce County Prosecutor Attorney
 930 Tacoma Ave. S. #946
 Tacoma WA 98402

FILED
 COURT OF APPEALS
 DIVISION II
 11 MAY 16 AM 9:52
 STATE OF WASHINGTON
 DEPT. OF CORRECTIONS

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my belief.

DATED THIS 12 day of MAY, 2011, in the City of Aberdeen, County of Grays Harbor, State of Washington.

WITH ALL RIGHTS RESERVED.

BRIAN DAVID MATTHEWS

BRIAN DAVID MATTHEWS

c/o [DOC 7910769 UNIT H201
 STAFFORD CREEK CORRECTIONS CENTER
 191 CONSTANTINE WAY
 ABERDEEN WA (98520)]

cc. file