

No. 42286-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS R. MOORE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Kitty-Ann Van Doorninck, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The judgment and sentence improperly orders inconsistent total terms.
2. The 384-term order would involve an increase in the sentence after successful appeal and would be in violation of appellant Thomas Moore's state and federal constitutional due process rights under North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part and on other grounds by, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).
3. Even under the lower term, Moore's due process rights were violated when the resentencing court imposed an exceptional sentence for the first time on remand after a successful appeal in which 7 of the 9 charges against him were reversed and dismissed.
4. The resentencing court violated Moore's rights under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and its progeny when the court made its own factual findings regarding aggravating factors and relied on those facts in deciding to impose the exceptional sentence.

Moore assigns error to the "factors" set forth in section V of the trial court's findings of fact and conclusions of law in support of the exceptional sentence, which provides:

The court finds substantial and compelling reasons to impose an exceptional sentence outside the standard range. The factors most compelling include: T.M. was only four years of age at the time of the assault; T.M. was completely dependant on the defendant for warmth, food, hygiene and love; T.M. was completely defenseless at the time of the assault; T.M. was incapable of escaping; T.M. was incapable of getting help. T.M. was not shown any mercy by the defendant at the time of the assaults. The defendant betrayed T.M.'s trust as his father and by inflicting multiple extraordinary injuries.

CP 175-76.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In the oral decision, the court indicated that it was ordering

378 months total for the sentence. 10RP 11. In the judgment and sentence, the trial court ordered Moore to serve 147 + 237 months (for a total of 384 months) on count 1, to run concurrent with 12 months on count 2. The court also wrote, however, that the “[a]ctual months of total confinement ordered is 378 months.” CP 146.

Should the judgment and sentence be corrected to reflect 378 months as the proper term?

2. If the term imposed is actually deemed to be 384 months, is reversal and remand for resentencing before a new judge required because the increased sentence on remand for resentencing would be in violation of Moore’s due process rights under Pearce?
3. Even if the term imposed was 378 months, is reversal and remand of the exceptional sentence required and should this Court order remand for resentencing before a different judge where the judge on remand imposed an exceptional sentence for the first time under circumstances giving rise to a presumption of judicial vindictiveness and the presumption has not been rebutted?
4. It is by now well-settled under Blakely and its progeny that the state and federal rights to due process and trial by jury require that any fact upon which an exceptional sentence is based is found by a jury based upon proof beyond a reasonable doubt.

Did the resentencing court violate Moore’s rights under Blakely when, in deciding to impose an exceptional sentence on remand for the first time, the court made specific factual findings and then relied on them as the “most compelling” “factors” supporting the new exceptional sentence?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Thomas Moore was charged by second amended information with first-degree assault of a child and 8 counts of tampering with a witness, with the aggravating factors of “abuse of trust” and “particularly vulnerable victim.” CP 15-20; RCW 9A.36.120(1)(b)(ii)(A);

RCW 9A.72.120(1)(a). Trial proceedings were held before the Honorable Judge Kitty-Ann Van Doorninck on June 9-11, 15-16, 22, 24-29, 2009, after which a jury found Moore guilty as charged. 1RP 1, 2RP 1, 3RP 1, 4RP 1, 5RP 1, 6RP 1, 7RP 1, 8RP 1, 9RP¹; CP 70-82. Judge Van Doorninck then imposed a standard range sentence on all counts of 318 months for the assault and 60 months on each of the tampering counts, all running concurrent but consecutive to another cause number in which the judge had sentenced Moore to 60 months. CP 101-15; 9RP 15.

Moore appealed and, on March 2, 2011, in an unpublished opinion, this Court reversed seven of the witness tampering convictions and remanded for resentencing on the remaining two counts. CP 117-33.

Resentencing proceedings were held before Judge Van Doorninck on May 27, 2011. 10RP 1. The judge ordered Moore to serve an exceptional sentence of 378 months total. 10RP 14-16; CP 141-54.

2. Facts relevant to issues on appeal

At the original sentencing, the prosecutor told the court that the offender score was "9" so that the standard ranges were 240-318 months for the assault count and 51-60 months for the "tampering" counts. 9RP 4.

¹The verbatim report of proceedings consists of 10 volumes, which will be referred to as follows:

the volume containing the proceedings of June 9, 2009, as "1RP,"
June 10, 2009, as "2RP;"
June 11, 2009, as "3RP;"
June 15, 2009, as "4RP,"
June 16, 2009 (a.m.), as "5RP;"
June 16, 2009 (p m), as "6RP;"
June 22 and 24, 2009, as "7RP,"
June 25 and 29, 2009, as "8RP;"
July 17, 2009, as "9RP,"
May 27, 2011, as "10RP "

He argued that the court should rely on the aggravating factors of abuse of trust and particular vulnerability of the victim as a “substantial and compelling reason” to impose an exceptional sentence of 480 months, which was two times the low end of the standard range. 9RP 4-5. The prosecutor also argued about the “facts and circumstances” in the case which he said also presented “substantial and compelling reasons to deviate,” discussing the evidence and testimony regarding the crimes at trial. 9RP 5-7.

Although the prosecutor conceded that the standard range in this case essentially was the same as if someone was convicted of first-degree murder, and although he admitted that the cases he discussed in his sentencing memo mostly were “homicide by abuse or murder in the second degree” cases, he submitted that they were “similar in fact pattern” because of the abuse in the case, albeit one which did not result in a death. 9RP 7-8. He argued that his request was “not unreasonable.” 9RP 8.

Counsel told the court in detail about Mr. Moore, giving his background in his church, his time in the army and his work with others in such things like suicide prevention. 9RP 8-9. He also argued for proportionality, noting that 8 of Moore’s “points” were because of the multiple counts of witness tampering, all of which were nonviolent and occurred after the fact of the initial crime. 9RP 10. He also pointed out Moore’s lack of prior criminal history. 9RP 10-11.

Counsel also addressed the prosecution’s arguments about the facts of the case and the pictures and evidence of the injuries. 9RP 11. He presented letters in Moore’s support and asked for a standard-range

sentence. 9RP 12.

Judge Van Doorninck agreed with Moore that he did not “deserve” mercy, saying she had “no doubt whatsoever that the jury was correct in their verdict.” 9RP 13. The judge also said she found it “particularly appalling” and was personally offended when “people get up and testify under oath and then clearly not telling the truth.” 9RP 13.

The judge declined to impose an exceptional sentence, however, stating that “the standard range in this case, because of the offender’s score, because of the behavior after the fact with the tampering of the witnesses gets us to a range that I think is appropriate.” 9RP 13. She ordered 318 months, the top of the standard range, on the assault count, and 60 months on each of the tampering charges, to run concurrent with each other but consecutive to a 60-month term on a sentence in a different cause number. 9RP 7, 14-15.

On appeal in this Court, Moore argued, *inter alia*, that his multiple convictions for witness tampering violated his constitutional rights to be free from double jeopardy. See CP 117-33. This Court agreed with Moore that “the evidence here supports a single unit of prosecution,” and ordered reversal of seven of the eight witness tampering convictions, as well as “resentencing on Moore’s remaining convictions.” CP 124-34.

On remand for resentencing, the parties met before Judge Van Doorninck on May 27, 2011, and the prosecution again asked for an exceptional sentence. 10RP 3-4. The corrected standard ranges for the offenses were now 111-147 months for the first-degree assault of a child and 4-12 months for the tampering offense. 10RP 7. The prosecutor

noted the jury had returned findings on the aggravating factors, offering to provide the court with “thumbnail photographs” of the injuries in order to refresh the court’s recollection of the case. 10RP 4.

Even though the court declined, the prosecutor nevertheless detailed the injuries and allegations at trial, asking the court to impose “147 months on the standard range for the assault child one, plus a 219-month exceptional,” and 12 months on the tampering charge. 10RP 5. He also argued that the time should be served consecutive to the other cause number. 10RP 6.

Counsel argued against an exceptional sentence and talked about Moore’s time in custody, noting that he was “infraction free,” had rewards for good behavior, completed stress and anger management classes, had a 4.0 g.p.a., and has been doing very well. 10RP 9.

The judge said she remembered the case “vividly,” and that all the counts of tampering made the standard range “obviously significantly higher” at the original sentencing. 10RP 10. She also noted that the prosecutors at that time argued for an exceptional sentence above the 318-month top of the standard range but she thought “that the sentence was appropriate, the 318 plus the 60 on top of that, 378, and nothing has changed[.]” 10RP 11. She said there were “certainly grounds” for the sentence based on the two aggravating factors having been found by the jury, and that “378 months is an appropriate amount of time.” 10RP 11. She said she thought the original sentence was “appropriate” and that she would have imposed an exceptional sentence in the first sentencing if the standard range had not been what it was at that past time. 10RP 11.

The judge also told Moore that his son “was traumatized and brutally beaten over a period of time,” and would “never recover from that.” 10RP 11-12. She concluded, “[j]ust in terms of what I think would be fair and appropriate, given what he has to live with for the rest of his life,” she was going to impose the exceptional sentence. 10RP 12.

Several months later, the court entered written findings of fact and conclusions of law in support of the exceptional sentence. CP 173-76. In those findings, which were drafted by the prosecution, the court said there were “substantial and compelling reasons to impose an exceptional sentence outside the standard range.” CP 174-75. It then went on:

The court finds substantial and compelling reasons to impose an exceptional sentence outside the standard range. The factors most compelling include: T.M. was only four years of age at the time of the assault; T.M. was completely dependant on the defendant for warmth, food, hygiene and love; T.M. was completely defenseless at the time of the assault; T.M. was incapable of escaping; T.M. was incapable of getting help. T.M. was not shown any mercy by the defendant at the time of the assaults. The defendant betrayed T.M.’s trust as his father and by inflicting multiple extraordinary injuries.

CP 175-76.

D. ARGUMENT

THE RESENTENCING COURT ERRED AND VIOLATED MOORE’S DUE PROCESS RIGHTS AS WELL AS HIS RIGHTS UNDER BLAKELY

The resentencing court erred in entering the new sentence, not only entering an improperly inconsistent sentence but also entering a sentence in violation of Moore’s due process rights and rights to trial by jury and proof beyond a reasonable doubt under Blakely.

First, the court’s order is, unfortunately, inconsistent in what

sentence was actually imposed. On the judgment and sentence, the “confinement” section provided, in relevant part:

4.5 **CONFINEMENT OVER ONE YEAR** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.589 Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

147 months on count I . . .
12 months on count II . . .

...

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections[:]

237 months on count I

...

Sentence enhancements on counts I shall run:

concurrent consecutive to each other

CP 148. In the same section, the court wrote that the “[a]ctual number of months of total confinement ordered is 378 months.” CP 148.

The problem is that 147 plus 237 is not 378; it is 384. The judgment and sentence thus imposes both a sentence of 384 months and a sentence of 378 months, depending upon which section of the document is read. But the findings and conclusions declare that the court intended to impose “141 months. . . plus 237 months. . . for a total of 378 months.” CP Thus, at a minimum, the case must be remanded to correct the judgment and sentence to the actual amount the judge intended, 378 months, when she said that she had thought at the initial sentencing “that the sentence

was appropriate, the 318 plus the 60 on top of that, 378, and nothing has changed[.]” 10RP 11.

In addition, regardless which number (378 or 384) is involved, resentencing is required, because both sentences were entered in violation of Moore’s due process rights.

It is essential in our system of government that a defendant not be penalized for exercising a constitutional right. See United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1209, 20 L. Ed.2d 106 (1968). In Pearce, the U.S. Supreme Court addressed this concern in the situation where a defendant has successfully appealed and is ultimately resentenced on remand. 395 U.S. at 725. In that context, the Court found that defendants have a due process right to be free from retaliation for having successfully appealed, as well as the right to be free from the fear that such retaliation may have played a part in the new sentence. 395 U.S. at 725, 725 n. 20.

As a result, under the state and federal due process clauses, “vindictiveness” against a defendant for having successfully appealed must play no part in a resentencing. Pearce, 395 U.S. at 726; see State v. Ameline, 118 Wn. App. 128, 75 P.3d 589 (2003). Thus, where a judge imposes a more severe sentence upon a defendant after a successful appeal, there is a presumption of vindictiveness which must be rebutted by objective evidence in the record supporting the increased sentence. See Smith, 490 U.S. at 799.

The presumption does not apply in situations where it has been deemed unlikely that a retaliatory motive would be the reason for a

particular sentence, such as when it is a different judge who imposes the new sentence or there is a new trial where additional evidence is admitted which supports the new sentence. See, e.g., Wasman v. United States, 468 U.S. 559, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984); State v. Parmelee, 121 Wn. App. 707, 709, 90 P.3d 1092 (2004). It also does not apply when the judge who later orders the sentence is the one who orders the new proceeding, because, “[u]nlike the judge who has been reversed, the trial judge” in that situation “had no motivation to engage in self-vindication.” Texas v. McCullough, 475 U.S. 134, 139, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986).

Here, the same judge imposed the new sentence. Further, there was no additional evidence or information on remand save for the reduction in the standard range caused by the successful appeal. There were therefore no events subsequent to the first proceeding “that may have thrown new light upon the defendant’s life, health, habits, conduct, and mental and moral propensities” to justify the imposition of the new sentence and rebut the presumption of vindictiveness. See Pearce, 395 U.S. at 722-23, quoting, Williams v. New York, 337 U.S. 241, 245, 69 S. Ct. 1079, 1082, 93 L. Ed. 1337 (1949).

In response, the prosecution may attempt to argue that the presumption should not apply because the same sentence was imposed on remand after the successful appeal. Of course, if the 384-month sentencing information is not ordered erased or corrected by this Court, then the same sentence was *not* imposed on remand, because the original sentence was 378 months, not 384.

Further, even under the correct, 378-month sentence the court apparently intended to impose, the presumption of vindictiveness still applies. Cases which appear to support the prosecution at first glance actually do not. For example, in State v. Barberio, 66 Wn. App. 902, 833 P.2d 459 (1992), affirmed, 121 Wn.2d 48 (1993), the Court held that there was no showing of vindictiveness when the new sentence was the same exceptional sentence imposed initially, even though there had been a small reduction in the offender score and standard range after a successful appeal. In that case, the defendant was sentenced to an exceptional sentence for a second-degree rape and a concurrent exceptional sentence for a third-degree rape. The sentence for the second-degree rape was based upon the existence of five aggravating factors but the sentence for the third-degree rape sentence was based upon a mathematical formula of “2 times the upper end of the standard range.” 66 Wn. App. at 905.

In the original appeal, the defendant challenged only the third-degree rape conviction, making no arguments that the exceptional sentence for the second-degree rape was improper. 66 Wn. App. at 904. The appellate court reversed the third-degree rape conviction, and the prosecution decided not to retry Barberio for that offense. Id. At the resentencing, the resentencing court heard arguments for why the sentence should be reduced, but decided, based upon the same five aggravating factors, to impose the same exceptional sentence. 66 Wn. App. at 904-905.

On appeal, the defendant raised multiple issues challenging the sentence, including an argument that there was not sufficient evidence to

support the aggravating factors and that those factors did not support the exceptional sentence, which the appellate court refused to address because they could have been raised in the first appeal. 66 Wn. App. at 906. The only “debatable contention” the court found on appeal was “whether the reduction in appellant’s offender score and standard range requires a proportionate reduction in the length of his reimposed exceptional sentence as a matter of law.” *Id.* Instead, the court said, the resentencing court was required to consider the corrected offender score to decide whether to impose an exceptional sentence on remand, which it did. 66 Wn. App. at 907. Further, the appellate court said, the trial court had determined that the exceptional sentence was warranted based upon the facts of the case and the aggravating factors, and then determined that the 72 month exceptional length was appropriate. 66 Wn. App. at 908.

In rejecting the argument that the reduction of the offender score required a corresponding reduction in the previously imposed exceptional sentence, the appellate court conceded that “the reduction in the offender score reduces appellant’s culpability as a matter of law” with “respect to the standard range.” 66 Wn. App. at 908. Because an exceptional sentence was imposed originally, and because of the discretion that applies “once a court and other arguments appropriately determines to impose an exceptional sentence,” the court did not find a violation of due process or an “abuse of discretion” in the length of the sentence. *Id.*

Similarly, in State v. Franklin, 56 Wn. App. 915, 786 P.2d 795, review denied, 114 Wn.2d 1004 (1990), the appellate court held that the resentencing of a defendant did not violate his due process rights where

the defendant was convicted of attempted first-degree murder and first-degree robbery and appealed, winning resentencing after the appellate court found that the offender score was miscalculated and the convictions should have been counted as “same criminal conduct.” 56 Wn. App. at 917-18. The original sentence was at the high end of the standard range for each offense - 144 months for the robbery and 411 months for the attempted murder, running concurrently. Id. On remand, the court reimposed the same sentences, this time imposing an exceptional sentence on the attempted murder based upon its finding that there were aggravating factors of deliberate cruelty and multiple injuries to the victim. Id.

On appeal, the court of appeals rejected arguments about deliberate cruelty inhering in the crime and being unconstitutionally vague and overbroad. 56 Wn. App. at 919. Almost in passing, the court addressed Franklin’s pro se argument that his due process rights were violated when the court relied on previously rejected aggravating factors in order to impose an exceptional sentence on remand. 56 Wn. App. at 919. Franklin argued that the imposition of the sentence “manifests vindictiveness by the court in the form of punishment for winning his appeal.” Id. While recognizing that due process prohibits an increase in the sentence on remand “motivated by a judge’s vindictive retaliation after reconviction following a successful appeal,” the appellate court simply declared that no presumption existed in Franklin’s case because “the sentence was not increased.” Id. The court also relied on the fact that it was “apparent” that the sentencing court had relied on the “merciless multiple stabbings” as the “significant factor in fixing and maintaining the sentence at 411

months.” Id. Under the facts of the case, the court concluded, the reduction of his offender score from “9 to 8 was of no moment” in that calculation, so that the court did not “abuse its discretion in imposing the sentence which is less than 12 percent above the 369.50-month standard range.” Id.

Here, in stark contrast to the sentences in Franklin and Barberio, there is a strong risk of vindictiveness, as evidenced by the facts. First, in Franklin and Barberio, there was only a marginal reduction in the offender score of one point, resulting in only a slight reduction in the standard range - in Franklin, to a high only 42 months less than previous, and in Barberio, even less of a change, from 26-34 months for the standard range to 21-27 months after the initial appeal. Franklin, 56 Wn. App. at 919; Barberio, 66 Wn. App. at 905. Thus, the differences in the standard ranges after the successful appeal did not result in an appreciably different presumptive sentence. As a result, when the courts in those cases reimposed the same sentence as before despite the corrected standard range, they were not making significant departures from the new range sufficient to cast doubt about whether the new range was really being given due consideration.

Here, however, the offender score change was significant - 7 points. And the reduction in the standard range was also large - **171 months**, more than **14 years** less than originally believed. Thus, unlike in Franklin and Barberio, there is a very great disparity between the initial and corrected standard ranges involved, casting doubt about whether the court in this case really gave due consideration to the changes in the case

caused by the successful appeal.

A second difference between this case and Barberio is that, unlike here, in Barberio the resentencing court did not impose an exceptional sentence for the first time on remand, but simply reaffirmed an exceptional sentence it had previously found proper based upon five aggravating factors which had been unaffected by the previous appeal. Here, there were only two aggravating factors and the court did not rely on those aggravating factors in imposing the original sentence but only after the successful appeal.

A further distinction and problem exists with applying Franklin here. Franklin looked only at the overall aggregate sentence and concluded, without citing to any authority, that there was no “increase” subject to the Pearce presumption because that overall sentence was essentially the same as the original sentence. Franklin, 56 Wn. App. at 519-20. But this overlooks the potential retaliatory nature of imposing the same sentence again on remand despite learning, by way of a successful appeal, that the original sentencing information was improper. As one authority has noted,

such an understanding of vindictiveness is too limited. In the classic Pearce case, the judge has violated the defendant's right to due process by, in effect, declaring “I'll show you there's a price to pay for appealing one of my decisions.” Such a statement does not appear significantly different, nor more vindictive, than the judge in the multi-count case who, by adopting the “aggregate package” approach, says “I'll show you there's no profit in appealing one of my decisions.” Both actions punish the defendant by negating her wholly legal and proper appellate efforts; they both deprive her of the right to attempt to reduce her punishment.

Youngwood, *The Presumption of Judicial Vindictiveness in Multi-Count*

Resentencing, 60 U. CHI. L. REV. 725, 747-48 (1993).

Notably, here, there is other evidence that “vindictiveness” may have played a part in the resentencing court’s decision, based upon its violations of Moore’s rights under Blakely. A defendant has a right to trial by jury and proof beyond a reasonable doubt under Blakely and its progeny, and those rights are violated when the judge makes factual findings regarding aggravating factors and then relies on those findings in imposing an exceptional sentence. See Blakely, 542 U.S. at 311-14; State v. Hughes, 154 Wn.2d 118, 125, 110 P.3d 192 (2005), reversed in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed 466 (2006). Blakely, Hughes and their progeny clearly establish that a defendant is constitutionally entitled to have a jury decide every fact upon which the sentencing court relies on in imposing an exceptional sentence, beyond a reasonable doubt.

In this case, there is no question that the jury found the aggravating factors as charged. The problem is that the resentencing court, in imposing the exceptional sentence for the first time on remand, relied on facts it found *other* than the aggravating factors the jury found, in imposing the exceptional sentence. It found facts regarding the victim’s age, the dependence of the victim on the defendant and the scope of that dependence. CP 175-76. It found facts about the ability of the victim to defend himself, the ability of the victim to get away and the victim’s ability to get help. CP 175. It found facts about whether the defendant had “shown any mercy” to the victim, whether he had betrayed the victim’s trust “as his father.” CP 175. And it found facts that there were inflicted

“multiple extraordinary injuries.” CP 175.

Further, it specifically declared these factual findings it had made itself as “[t]he factors most compelling” in support of the exceptional sentence. CP 175.

None of those “facts,” however, was found by the jury, which was asked only to answer “yes” or “no” to whether the defendant knew “the victim was particularly vulnerable or incapable of resistance” and whether he “use[d] his position of trust to facilitate the commission of the crime.” CP 82.

The fact that the resentencing court made, entered and relied on its own factual findings, in violation of Moore’s constitutional rights under Blakely, is further evidence of the risk of judicial vindictiveness as part of the resentencing proceeding. This Court should so hold and, upon review of this issue, should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for resentencing. Further, the resentencing should be held this time in front of a new judge whose authority was not questioned by the appellant in this and his previous appeal, to avoid any further appearance of vindictiveness or retaliation.

DATED this 20th day of April, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office by depositing a copy into first-class postage prepaid at the following address. 940 County City Building, 930 Tacoma Ave S, Tacoma, WA. 98402, and to Mr Thomas Moore, DOC 332727, Airway Heights CC, P O Box 2049, Airway Heights, WA 99001.

DATED this 20th day of April, 2012

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