

No. 42570-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Allan Simmons,

Appellant.

Thurston County Superior Court Cause No. 09-1-00693-1

The Honorable Judge Anne Hirsch

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT..... 5

I. Mr. Simmons was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel 5

A. Standard of Review 5

B. An accused person is constitutionally entitled to the effective assistance of counsel. 5

C. Defense counsel unreasonably stipulated to the inclusion of Mr. Simmons’s Illinois aggravated battery conviction in the offender score..... 7

D. Defense counsel unreasonably allowed Mr. Simmons to participate in a presentence interview by DOC without a lawyer present, and failed to object to the use of statements at sentencing..... 12

II. The sentencing court’s finding regarding Mr. Simmons’s present or future ability to pay his legal financial obligations is not supported by the record.... 15

CONCLUSION 15

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Estelle v. Smith</i> , 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) ..	12
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	6
<i>Mitchell v. United States</i> , 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).....	12
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	6

WASHINGTON STATE CASES

<i>In re Pers. Restraint of Lavery</i> , 154 Wash.2d 249, 111 P.3d 837 (2005)...	8, 11, 12
<i>State v. A.N.J.</i> , 168 Wash.2d 91, 225 P.3d 956 (2010).....	5, 12, 15
<i>State v. Agtuca</i> , 12 Wash.App. 402, 529 P.2d 1159 (1974).....	13
<i>State v. Bertrand</i> , ___ Wash.App. ___, ___ P.3d ___ (2011)	15
<i>State v. Cabrera</i> , 73 Wash. App. 165, 868 P.2d 179 (1994)	8
<i>State v. Everybodytalksabout</i> , 161 Wash.2d 702, 166 P.3d 693 (2007)..	13, 15
<i>State v. Ford</i> , 137 Wash.2d 472, 973 P.2d 452 (1999).....	7, 8
<i>State v. Heddrick</i> , 166 Wash.2d 898, 215 P.3d 201 (2009).....	13
<i>State v. Hendrickson</i> , 129 Wash.2d 61, 917 P.2d 563 (1996)	7
<i>State v. McGill</i> , 112 Wash.App. 95, 47 P.3d 173 (2002).....	12
<i>State v. Morley</i> , 134 Wash.2d 588, 952 P.2d 167 (1998).....	8
<i>State v. Reichenbach</i> , 153 Wash.2d 126, 101 P.3d 80 (2004)	6

<i>State v. Sargent</i> , 111 Wash.2d 641, 762 P.2d 1127 (1988)	13
<i>State v. Thiefault</i> , 160 Wash.2d 409, 158 P.3d 580 (2007)	8

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V	12, 13
U.S. Const. Amend. VI.....	1, 2, 5, 13
U.S. Const. Amend. XIV	1, 2, 5, 6
Wash. Const. Article I, Section 22.....	6

WASHINGTON STATUTES

RCW 9.94A.500.....	7
RCW 9.94A.510.....	12
RCW 9.94A.515.....	12
RCW 9.94A.525.....	7, 11
RCW 9A.04.110.....	10
RCW 9A.36.021.....	9, 10

OTHER AUTHORITIES

Former IL ST CH 720 § 5/12-4(a) (2004)	9
<i>Illinois v. Mays</i> , 437 N.E.2d 633 (Ill.,1982)	10
<i>Illinois v. Mimes</i> , 953 N.E.2d 55 (Ill.App. 2011)	10
<i>In re Carter</i> , 848 A.2d 281 (Vt.,2004).....	13, 14
<i>See In re Keith C.</i> , 880 N.E.2d 1157 (Ill.App. 2007).....	10
<i>United States v. King</i> , 559 F.3d 810 (C.A.8 2009)	13

ASSIGNMENTS OF ERROR

1. Mr. Simmons was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel unreasonably failed to object to the court's consideration of his client's 2005 Illinois conviction for aggravated battery when determining the offender score.
3. Defense counsel unreasonably stipulated to an offender score of three, when Mr. Simmons should have been sentenced with an offender score of one.
4. Defense counsel deprived Mr. Simmons of the effective assistance of counsel by allowing him to submit to a presentence interview by the Department of Corrections.
5. Defense counsel unreasonably failed to object to the P.S.I. on the grounds that his client's statements were taken in the absence of counsel.
6. The sentencing court erred by finding that Mr. Simmons has the ability or likely future ability to pay his legal financial obligations.
7. The sentencing court erred by adopting Finding No. 2.5 (Judgment and Sentence).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has a constitutional right to the effective assistance of counsel. In this case, defense counsel unreasonably failed to object to the court's consideration of Mr. Simmons's Illinois conviction for aggravated battery, and erroneously stipulated to an offender score of three. Was Mr. Simmons denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?
2. An accused person has a constitutional right to remain silent pending sentencing. Here, defense counsel unreasonably

allowed DOC to conduct a presentence interview of Mr. Simmons, without the presence of counsel, and failed to object to the sentencing judge's consideration of written and oral statements made by Mr. Simmons during that interview. Was Mr. Simmons denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

3. A court may not find that an offender has the ability or likely future ability to pay legal financial obligations, absent some support in the record for the finding. Here, the sentencing court made such a finding in the absence of any supporting evidence in the record. Was the sentencing court's finding clearly erroneous?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Following a jury trial, Allan Simmons was convicted of first-degree rape and second-degree assault with sexual motivation. CP 17. At sentencing, the prosecution alleged that Mr. Simmons was a persistent offender, based on two Illinois convictions. State's Sentencing Brief, Supp. CP. Defense counsel submitted a sentencing memorandum, in which he argued that Mr. Simmons's Illinois robbery conviction was not comparable to a most serious offense. Defense Sentencing Brief, Supp. CP. Defense counsel's brief did not specifically address the other Illinois offense, a 2005 conviction for aggravated battery. Defense Sentencing Brief, Supp. CP.

Prior to sentencing, Mr. Simmons was interviewed at the Thurston County Jail. The interview was conducted by a Community Corrections Officer employed by the Department of Corrections. Mr. Simmons's attorney did not attend the interview. *See* Presentence Investigation (PSI), p. 4, Supp. CP. There is no indication that Mr. Simmons was advised of his right to remain silent pending sentencing, or of his right to have counsel present during the interview. *See* PSI, *generally*, Supp. CP. Mr. Simmons provided a written account of the offense, apparently without the involvement of counsel. PSI, pp. 3-4, Supp. CP. In his written and oral

statements, he denied having raped anyone. He told the interviewer that the he believed the victim was lying because she regretted cheating on her boyfriend. PSI, pp. 3-4, Supp. CP. He also described the facts underlying his aggravated battery conviction, stating that he broke the victim's jaw during a fight. PSI, p. 5, Supp. CP.

The sentencing court found each Illinois offense comparable to a most serious offense in Washington, and sentenced Mr. Simmons as a persistent offender. CP 17-26. Mr. Simmons appealed, arguing that his assault conviction violated double jeopardy, and that the Illinois robbery conviction was not comparable to a Washington felony. The Court of Appeals agreed on both points, and ordered the lower court to vacate the assault conviction and sentence Mr. Simmons without including the Illinois robbery conviction in the calculation of his offender score. *See* Slip. Op. (attached to Mandate, Supp. CP).

At a resentencing hearing, the prosecutor announced that the parties agreed on Mr. Simmons's criminal history and offender score:

Both Mr. Jefferson and I have agreed that the criminal history, the score for Mr. Simmons would be a three. That is based upon the aggravated assault conviction out of Illinois, which would count as a two-point multiplier and has been conceded by the defense at the prior sentencing and this one, and then also a theft second out of Thurston County.
RP 4.

Defense counsel confirmed that he agreed with the criminal history. RP 6.

The sentencing judge noted that she had again reviewed the PSI. She remarked that Mr. Simmons “does not understand or appreciate how serious his actions were and the very damaging effect they have not just on the victim in this case but potentially on the community at large when he’s released.” RP 13. She sentenced him to the top of the standard range, imposing a life sentence with a minimum of 160 months. RP 13; CP 45-59. Although there had been no discussion of the topic, the sentencing court entered a finding that Mr. Simmons had the ability or likely future ability to pay legal financial obligations. CP 47.

Mr. Simmons timely appealed. CP 27.

ARGUMENT

I. MR. SIMMONS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of

Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice - “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately; the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Further, there must be some indication in the record that counsel was

actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.”)

C. Defense counsel unreasonably stipulated to the inclusion of Mr. Simmons’s Illinois aggravated battery conviction in the offender score.

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist.” RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). Out-of-state convictions “shall be classified according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3).

Where the state alleges a defendant’s criminal history contains out-of-state convictions, the state bears the burden of proving the existence and comparability of those convictions. *State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999). An out-of-state conviction may not be used to increase an offender score unless the state proves the conviction would be a felony under Washington law. *State v. Cabrera*, 73 Wash. App. 165,

168, 868 P.2d 179 (1994). An out of state conviction may be included in the offender score if there is either legal or factual comparability with a Washington felony. *In re Pers. Restraint of Lavery*, 154 Wash.2d 249, 255, 111 P.3d 837 (2005).

To determine legal comparability, the court must examine the elements of the out-of-state offense and the corresponding Washington statutes in effect when the foreign crime was committed. *State v. Morley*, 134 Wash.2d 588, 606, 952 P.2d 167 (1998). “If the elements are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant’s conduct would have violated the comparable Washington offense.” *Ford*, at 479 (citing *Morley*, at 606).

As noted in Mr. Simmons’s first appeal, the underlying facts that may be examined to determine comparability are those facts “necessarily proved beyond a reasonable doubt or expressly admitted by the defendant.” Slip Op., p. 10 (citing *Lavery*, *supra*, and *State v. Thieffault*, 160 Wash.2d 409, 158 P.3d 580 (2007)) (attachment to Mandate, Supp. CP)¹ Thus the sentencing court is not permitted to examine a

¹ In the first appeal, the Court reviewed the record of Mr. Simmons’s Illinois plea hearing on his robbery charge. After determining that he had not explicitly ratified the prosecutor’s oral summary of the evidence (or otherwise acknowledged any underlying

probable cause statement or police reports, unless the offender expressly stipulates to them. *Lavery, at 258.*

In this case, defense counsel provided deficient performance when he agreed that Mr. Simmons's 2005 aggravated battery conviction was equivalent to Assault in the Second Degree, and stipulated to an offender score of three. This is so because the out-of-state conviction was not comparable to Assault in the Second Degree, and should not have been included in the offender score.

The Illinois law under which Mr. Simmons was convicted provided that "A person who, in committing a battery, intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery." Former IL ST CH 720 § 5/12-4(a) (2004). The most likely comparable Washington crime is second-degree assault, which occurs when a person "Intentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a).

The Illinois definition of "great bodily harm" is broader than Washington's definition of "substantial bodily harm." The latter is precisely defined to mean "bodily injury which involves a temporary but

facts), the Court found that the record did not establish comparability, and vacated his persistent offender sentence. Slip Op., p. 11-12 (attachment to Mandate, Supp. CP).

substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part...” RCW 9A.04.110(4)(b). In Illinois, by contrast, the phrase “great bodily harm” has no statutory definition. Illinois courts have noted that the term “is not susceptible of a precise legal definition.” *Illinois v. Mimes*, 953 N.E.2d 55, 65 (Ill.App. 2011). Instead, “it requires an injury of a greater and more serious character than an ordinary battery.” *Id.*² Thus, for example, a person may be convicted of aggravated battery in Illinois for inflicting a cut that requires four staples, even if the cut does not result in the temporary but substantial injuries necessary to sustain a conviction under RCW 9A.36.021(1)(a). *See In re Keith C.*, 880 N.E.2d 1157 (Ill.App. 2007).

Because the Illinois crime is broader than the corresponding Washington crime, the two are not legally comparable.

Here the record presented by the prosecution did not establish the comparability of Mr. Simmons’s aggravated assault conviction. First, the Indictment alleged only that Mr. Simmons knowingly “caused great bodily harm to Billy Roberts, in that he struck Billy Roberts on or about the

² The definition of bodily harm for an ordinary battery is also “difficult to pinpoint exactly,” but involves “some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent.” *Illinois v. Mays*, 437 N.E.2d 633, 635-636 (Ill.,1982).

face.” Indictment (attachment to State’s Sentencing Brief, Supp. CP). At the plea hearing, Mr. Simmons did not personally admit or acknowledge any facts. Transcript, pp. 1-11 (attachment to State’s Sentencing Brief, Supp. CP). Through counsel, Mr. Simmons stipulated to the prosecutor’s brief summary of the evidence, which included no more information than was set forth in the Indictment. Transcript of plea hearing, p. 7 (attachment to State’s Sentencing Brief, Supp. CP).

These facts—which are the only facts available for the analysis—do not establish comparability.³ Accordingly, defense counsel should not have stipulated to the inclusion of the Illinois aggravated assault conviction, and should instead have objected on comparability grounds. *Lavery, at 258.*

Counsel’s failure to object prejudiced Mr. Simmons. The aggravated assault conviction added two points to Mr. Simmons’s offender score under RCW 9.94A.525(9). Had the offense not been included in his criminal history, his offender score would have been one,

³ Additional information—which Mr. Simmons did not acknowledge—suggested that Mr. Simmons broke the victim’s jaw. *See* Dekalb Police Department Supplemental Investigation Report (attachment to State’s Sentencing Brief, Supp. CP). Unfortunately for Mr. Simmons, he apparently admitted this information during his presentence interview with DOC. *See* Presentence Investigation Report, p. 5, Supp. CP. This error is challenged elsewhere in this brief.

and his standard range would have been 103-136 months, instead of 120-160 months. RCW 9.94A.510 and .515.

Mr. Simmons was denied his right to the effective assistance of counsel. *A.N.J., supra*. Accordingly, his sentence must be vacated, and the case remanded for resentencing with an offender score of one. *Id;* *Lavery, at 258*.

D. Defense counsel unreasonably allowed Mr. Simmons to participate in a presentence interview by DOC without a lawyer present, and failed to object to the use of statements at sentencing.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences from a defendant's silence pending sentencing. *Mitchell, at 328-329*.

An offender also has a right to the effective assistance of counsel at sentencing. *See, e.g., State v. McGill*, 112 Wash.App. 95, 97, 47 P.3d 173 (2002). Furthermore, a presentence investigation (PSI) interview is a “critical stage”⁴ of a criminal proceeding, at which the offender has a

⁴ A critical stage “is one ‘in which a defendant’s rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise

Sixth Amendment right to counsel.⁵ *State v. Everybodytalksabout*, 161 Wash.2d 702, 708, 166 P.3d 693 (2007). As one court has pointed out:

having a system which allows these reports, which generally carry great weight in the determination of a defendant's sentence, to be made without assistance of counsel leaves the indigent and inept at great disadvantage. For example, in exactly this kind of case, in which defendant testified at trial, the uncounselled and uneducated may believe that consistency is the highest virtue, perjury the greatest threat.

In re Carter, 848 A.2d 281, 292 (Vt.,2004).⁶

In this case, Mr. Simmons participated in a presentence interview conducted by DOC. His attorney did not attend, and there is no indication that Mr. Simmons was advised of his right to remain silent or of his right to remain silent. *See* Presentence Investigation (PSI), p. 4, Supp. CP. Mr. Simmons also submitted a handwritten statement to the investigator, apparently without his attorney's involvement. PSI, p. 3, Supp. CP.⁷ In

substantially affected.” *State v. Heddrick*, 166 Wash.2d 898, 911, 215 P.3d 201 (2009) (quoting *State v. Agtuca*, 12 Wash.App. 402, 404, 529 P.2d 1159 (1974)).

⁵ Under appropriate circumstances, a PSI interview also implicates the offender's Fifth Amendment right to counsel. *See State v. Sargent*, 111 Wash.2d 641, 762 P.2d 1127 (1988).

⁶ Under the federal criminal justice system, a PSI interview is not a critical stage. *See, e.g., United States v. King*, 559 F.3d 810, 814 (C.A.8 2009). One reason for this is that “[i]n the federal system, the probation officer is an employee of the judicial branch.” *Carter*, at 301. In Washington, by contrast, the PSI is authored by an employee of DOC, an executive branch agency.

⁷ He also admitted that his Illinois aggravated assault conviction resulted in a broken jaw for the victim. As noted elsewhere in the brief, this admission could have been

his statements, Mr. Simmons continued to deny the offense despite the jury's guilty verdict, and failed to show any remorse or appreciation for the impact on the victim. PSI, pp. 3-4, Supp. CP. Under these circumstances, "[i]t is not an overstatement to say that [Mr. Simmons] committed sentencing suicide in his PSI interview." *Carter*, at 296.

These statements were used at sentencing, without any objection from defense counsel. RP 12-13. From them (and from Mr. Simmons's brief allocution), the sentencing judge concluded that Mr. Simmons "does not understand or appreciate how serious his actions were and the very damaging effect they have not just on the victim in this case but potentially on the community at large when he's released." RP 13.

Had defense counsel assisted Mr. Simmons during the PSI interview, helped him by asserting his right to remain silent, or objected to the court's consideration of the statements, the sentencing judge may have been inclined to set his minimum sentence below the top of the standard range. Instead, relying at least in part on these statements, the court imposed 160 months to life. RP 13; CP 45-59.

Mr. Simmons was denied the effective assistance of counsel by his counsel's decision to allow him to participate in the PSI interview, by

used to establish comparability of the offense, had counsel objected to the inclusion of the 2005 conviction in Mr. Simmons's offender score.

failing to attend the interview, and by failing to object when the sentencing court considered his client's statements. *A.N.J., supra; Everybodytalksabout, supra.* Accordingly, the sentence must be vacated and the case remanded for a new sentencing hearing. *Everybodytalksabout, supra.*

II. THE SENTENCING COURT'S FINDING REGARDING MR. SIMMONS'S PRESENT OR FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS IS NOT SUPPORTED BY THE RECORD.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, ___ Wash.App. ___, ___, ___ P.3d ___ (2011). In this case, the sentencing court entered such a finding without any support in the record. CP 47. Indeed, the record suggests that Mr. Simmons lacks any ability to pay the amount ordered, given that this conviction diminishes his chances of ever finding gainful employment. Accordingly, Finding No. 2.5 of the Judgment and Sentence must be vacated. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Simmons's sentence must be vacated. His case must be remanded for resentencing with an offender

score of one. In the alternative, Finding No. 2.5 of the Judgment and Sentence must be vacated.

Respectfully submitted,

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A handwritten signature in cursive script that reads "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 9, 2011.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

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