

NO. 49616-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

ARIANNA EISELE-CHAVEZ,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. Trial counsel's failure to inform the defendant of the consequences of entering her diversion agreement denied her effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, and required vacation of the conviction that followed her unsuccessful completion of the diversion agreement.

2. Should the state prevail this court should exercise its discretion and refrain from imposing costs on appeal.

Issues Pertaining to Assignment of Error

1. Does a trial counsel's failure to inform a defendant of the consequences of entering a diversion agreement deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, and require vacation of the conviction that followed the unsuccessful completion of that diversion agreement?

2. If the state prevails on appeal should the court award costs against an appellant with no present or future ability to pay?

STATEMENT OF THE CASE

On June 10, 2014, the Mason County Prosecutor filed an information charging the defendant Arianna Eisele-Chavez with one count of second degree malicious mischief alleging that on June 4, 2014, the defendant “knowingly and maliciously cause[d] physical damage in an amount exceeding seven hundred fifty dollars . . . to the property of Rene Morales Gomez.” CP 64. Four days previous the court had appointed counsel to represent her upon a finding that she was indigent. CP 65-66. In fact, at that time she was living off of food stamps and Social Security Income. *Id.*

Eventually the defendant decided to resolve this case by entering into a diversion agreement, whereby she gave up her right to go to trial and present evidence in return for the prosecutor’s promise to dismiss the charge if the defendant successfully completed treatment and followed the requirements of the diversion program. CP 51-55, 56. As a result, on September 16, 2014, the defendant’s attorney reviewed a document with her entitled “Declarations, Waivers and Stipulations of the Defendant re: “Friendship” Diversion Program.” The original agreement was a pre-printed form on which counsel adds information appropriate to the case. CP 51-55. Paragraph 9 of the form includes three blank, underlined spaces for counsel to finish. *Id.* In the first counsel is supposed to put in the maximum potential term of imprisonment. In the second and third counsel is supposed to write

in the maximum possible fine. *Id.* The blank form of paragraph 9 appears as follows:

9. I understand that the crimes with which I have been charged each have a maximum sentence of _____) years in prison and a _____ thousand dollar (\$____,000.00) fine. I also understand that if I am later convicted of the present charges against me, I will be prohibited from possession, owning, or having under my control any firearm unless my right to do so is specifically restored by a Court of Record.

CP 54.

In this case counsel originally wrote “364 days” in the first underlined blank, “5,000⁰⁰” in the second underlined blank, and “5” in the third underlined blank. CP 54. Counsel also crossed out the words “years” and “prison.” *Id.* As a result, the completed form counsel reviewed with the defendant, and that they both signed, read as follows:

9. I understand that the crimes with which I have been charged each have a maximum sentence of 364 days) years in ~~prison~~ and a 5,000⁰⁰ thousand dollar (\$5,000.00) fine. I also understand that if I am later convicted of the present charges against me, I will be prohibited from possession, owning, or having under my control any firearm unless my right to do so is specifically restored by a Court of Record.

CP 54.

At no point during the later colloquy between the defendant and the court did the court inform the defendant that she was entering a diversion agreement on a felony, as opposed to a misdemeanor. CP 1-5. Rather, when the court reviewed paragraph 9 of the agreement, the following exchange

took place between the court on the one side and the defense attorney and the prosecutor on the other side:

THE COURT: Any promises or threats been made to you to give up a valuable – many valuable rights that you have in order to proceed in diversion?

MS. EISELE-CHAVEZ: No.

THE COURT: Is the State amending the information?

MR. ROTHMAN: No, Your Honor.

THE COURT: Okay, because the last page says that I understand I've been charged with a - essentially a gross misdemeanor, and this is a Class C felony, or Class – yes, Class C felony. So, Mr. Sergi?

MR. SERGI: Your Honor, I'll change that on there.

THE COURT: Okay, if you'll approach. Does the State want to place anything else on the record?

MR. ROTHMAN: No, Your Honor. I believe this is a good – other than to say this is a good resolution to this case. I have the victim present here today, so I know that he's in agreement with this resolution and that the restitution has been paid.

THE COURT: Okay, and, Mr. Sergi, anything further for the record on this matter?

MR. SERGI: No.

Pause.

THE COURT: Ms. Chavez, the Court does find that you are a good candidate for this program and I wish you well in it.

MS. EISELE-CHAVEZ: Thank you.

THE COURT: The Court has signed the order allowing you to

enter into the program, signed an order that amends your conditions of release to eliminate the no contact provision, has signed the order that exonerates your bail or bail bond and has set a hearing to hopefully congratulate you at the end of this process. It's set for September 7, 2015. We'll give you a written reminder of that. We're not going to send you a postcard right before, so you need to remember that date. And hopefully you'll be coming in to be congratulated on a job well done.

MS. EISELE-CHAVEZ: Alright, thank you.

THE COURT: Thank you.

Matter is adjourned.

RP 4-5.

Apparently, during the time designated in the record as "Pause" defense counsel amended paragraph 9 by crossing out "364 days" and substituting "5yr", writing "10" over the "5" in the second and third blanks. CP 54. Counsel also apparently drew a line in the margin to the right of paragraph 9 and had the defendant place here initials there. *Id.* The words "years" and "prison" remained crossed out on the final version of paragraph 9. CP 54.

After the "pause" noted in the record the court did not inform the defendant that she had stipulated to the commission of a felony should she be terminated from the diversion program. RP 4-5. In addition, neither the form, the court nor counsel informed the defendant that if she were ultimately convicted of the felony she would lose federal welfare benefits, including

Section 8 housing benefits. RP 1-5.

On November 24, 2015, the defendant appeared before the court on a claim that she had violated the terms of her diversion. CP 12-19. At that time the court took her out of the program, reviewed the probable cause statement, and then found her guilty beyond a reasonable doubt of the original felony charge. RP 12-19. The court then imposed 30 days in jail converted to 240 hours community service as well as mandatory costs. CP 21-30.

On September 20, 2016, the defendant filed a motion to vacate her judgment and sentence. CP 17-18. In that motion the defendant made the following claims: (1) that in entering the diversion agreement neither her counsel nor the court informed her that if she were convicted she would lose her Section 8 federal housing benefits, (2) that had counsel informed her that she would lose those benefits as a result of a conviction she would have taken the case to trial, (3) that she recently lost her Section 8 federal housing benefits based upon her conviction in this case, and (4) that trial counsel's failure to inform her that she would lose her federal welfare benefits upon conviction constituted ineffective assistance of counsel. CP 17-18. As a result, defendant argued that the court should vacate her conviction, allow her to withdraw her diversion agreement, and then set the case for trial. *Id.*

In an affirmation addressing these issues, defendant's trial counsel

made the following statement:

I was counsel for the defendant. I do not remember advising the defendant of this consequence at any state of the proceedings nor is it listed in any of the Friendship documents that failure to complete Friendship and the subsequent felony would affect the ability to obtain rental housing. This is a significant consequence the defendant was not advised of. The house disability seems to be significant enough to advise a drug offender of that consequence in a change of plea. Perhaps every felony defendant should be advised of the possible consequence of housing being affected although we are, of course, here for this defendant.

CP 18.

The trial court denied the motion, finding that the relief she was requesting was not available under CrR 7.8(b) because she entered a diversion agreement, not a guilty plea. RP 25-20; CP 11. The court order states:

This matter was not a plea, it was a trial on stipulation to facts in the police report and friendship diversion contract. The court finds no basis to withdraw plea under Court Rule 7.8. Defendant's motion to withdraw plea is denied.

CP 11.

Following entry of this order defendant filed timely notice of appeal.

CP 7.

ARGUMENT

I. TRIAL COUNSEL'S FAILURE TO INFORM THE DEFENDANT OF THE CONSEQUENCES OF ENTERING HER DIVERSION AGREEMENT DENIED HER EFFECTIVE ASSISTANCE OF COUNSEL AND REQUIRED VACATION OF THE CONVICTION THAT FOLLOWED HER UNSUCCESSFUL COMPLETION OF THE DIVERSION AGREEMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, petitioner claims ineffective assistance based upon trial counsel’s failure to inform her of the consequences that would occur were she terminated from the diversion agreement she was considering entering. The following sets out this argument in light of the decision in *State v. Ashue*, 145 Wn.App. 492, 188 P.3d 522 (2008).

In *State v. Ashue*, *supra*, a defendant charged with residential burglary entered a pretrial diversion agreement with the prosecutor. Under the terms of that agreement the charges would eventually be dismissed upon the defendant’s successful completion of certain requirements. In order to obtain the agreement, the defendant had to waive her right to jury trial, her right to present and contest the state’s evidence, and she had to stipulate to the admissibility of the state’s evidence.

The defendant eventually failed to meet the requirements of the agreement. Following a hearing on the matter the court removed her from the

diversion program, reviewed the evidence to which she had stipulated and found her guilty of the charge. The defendant then appealed her conviction, arguing that the trial court should have invalidated the diversion agreement and set her case for trial. Among other claims in support of this resolution the defendant argued that (1) she did not knowingly waive her constitutional right to jury trial and to present evidence, and (2) trial counsel's failure to inform her of the potential effects of entering the agreement denied her effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. Specifically, she argued that counsel's advice that she waive her right to jury trial and that she stipulate to facts in order to enter the diversion was ineffective.

In addressing the first claim the court recited the following standard concerning the waive of constitutional right specific to criminal cases:

It is well established that constitutional rights are subject to waiver by an accused if he or she knowingly, intentionally, and voluntarily waives them. The burden to establish a valid waiver is upon the prosecution.

"The validity of any waiver of a constitutional right, as well as the inquiry required by the court to establish waiver, will depend on the circumstances of each case, including the defendant's experience and capabilities." The court's inquiry will also differ depending on the nature of the constitutional right at issue. *Id.* However, "a court must indulge every reasonable presumption against waiver of fundamental rights."

State v. Ashue, 145 Wn.App. at 502-503 (citations omitted).

The court then went on to reject the defendant's claim on this argument, noting that the defendant had signed a diversion agreement that adequately set out each of her constitutional rights and that the court had then held a colloquy with her during which the court verified that she understood each right that she was waiving.

The court then proceeded to review the defendant's claims of ineffective assistance. First, the court noted that counsel's advice that defendant waive her right to jury trial and her right to present evidence through a stipulation to fact fell well within the tactical advice that counsel is expected to give. While the court did not find that such advice could never constitute ineffective assistance, it found those circumstances rare and not applicable in this case. Thus, the court rejected the defendant's second argument of ineffective assistance.

By contrast, in the case at bar, a careful review of the diversion agreement and the court's colloquy with the defendant when it accepted the agreement reveals that neither counsel nor the court either explained two critical elements of the diversion agreement to the defendant. The first deficiency was in both trial counsel and the court's failure to inform the defendant that she was stipulating to facts and waiving jury on a felony charge as opposed to a misdemeanor charge. The second deficiency was counsel's failure to inform the defendant of the consequences of failing to

meet the requirements of the agreement. The following addresses these two issues.

Paragraph 9 of the diversion agreement as counsel originally read it to the defendant and as counsel gave it to the court erroneously stated that the maximum penalty the defendant was facing was 364 days in jail and a \$5,000.00 fine. This is the maximum penalty for a gross misdemeanor, not the Class C felony charged in the information. Section 9 of the diversion agreement read as follows:

9. I understand that the crimes with which I have been charged each have a maximum sentence of 364 days) years in prison and a 5,000⁰⁰ thousand dollar (\$5,000.00) fine. I also understand that if I am later convicted of the present charges against me, I will be prohibited from possession, owning, or having under my control any firearm unless my right to do so is specifically restored by a Court of Record.

CP 54.

The fact that can be inferred from this document is that defense counsel thought his client was entering a diversion agreement on a misdemeanor. Not only did he put “365 days” and “\$5,000.00” as the maximum penalty, but he also struck out the words “years” and “prison” since 364 is calculated under Washington law as a term of days not years, and is also a term served in a county jail, not a Department of Corrections prison. Thus, counsel entered the diversion colloquy believing his client was charged with misdemeanor. However, more importantly, the defendant entered the

diversion colloquy believing she was entering an agreement on a misdemeanor.

This error in paragraph 9 of the Diversion agreement was not lost on the court. During its colloquy with the defendant the court stopped at paragraph 9 and then started addressing his comments to the attorneys. This part of the colloquy went as follows:

THE COURT: Any promises or threats been made to you to give up a valuable – many valuable rights that you have in order to proceed in diversion?

MS. EISELE-CHAVEZ: No.

THE COURT: Is the State amending the information?

MR. ROTHMAN: No, Your Honor.

THE COURT: Okay, because the last page says that I understand I've been charged with a - essentially a gross misdemeanor, and this is a Class C felony, or Class – yes, Class C felony. So, Mr. Sergi?

MR. SERGI: Your Honor, I'll change that on there.

THE COURT: Okay, if you'll approach. Does the State want to place anything else on the record?

MR. ROTHMAN: No, Your Honor. I believe this is a good – other than to say this is a good resolution to this case. I have the victim present here today, so I know that he's in agreement with this resolution and that the restitution has been paid.

THE COURT: Okay, and, Mr. Sergi, anything further for the record on this matter?

MR. SERGI: No.

Pause.

RP 4-5.

During the pause defense counsel apparently wrote over what he had originally written in paragraph 9 so that it ended up stating the following:

9. I understand that the crimes with which I have been charged each have a maximum sentence of ~~364 days~~ 5yr) years in prison and a 10,000⁰⁰ thousand dollar (\$10,000.00) fine. I also understand that if I am later convicted of the present charges against me, I will be prohibited from possession, owning, or having under my control any firearm unless my right to do so is specifically restored by a Court of Record.

CP 54.

In spite of this obvious error in the diversion agreement, once counsel amended it and had the defendant put her initials by paragraph 9, the court inexplicably failed to clarify that the defendant really understood that she was entering a diversion agreement on a felony, which has many more potential negative consequences than did entering a diversion on a misdemeanor. Thus, this record does not lead to a conclusion that the defendant understood the consequences of the agreement she was entering.

The second deficiency in the diversion agreement and the colloquy was related to the first. As is set out in counsel's affirmation given in support of the defendant's post-trial motion, counsel did not inform the defendant that her potential conviction on a felony would take away her Title 8 housing benefits. The supporting affirmation states as follows on this issue:

I was counsel for the defendant. I do not remember advising the defendant of this consequence at any state of the proceedings nor is it listed in any of the Friendship documents that failure to complete Friendship and the subsequent felony would affect the ability to obtain rental housing. This is a significant consequence the defendant was not advised of. The house disability seems to be significant enough to advise a drug offender of that consequence in a change of plea. Perhaps every felony defendant should be advised of the possible consequence of housing being affected although we are, of course, here for this defendant.

CP 18.

It is debatable whether or not every defendant entering a diversion agreement need be informed that a conviction on the underlying felony will disqualify the defendant from federal welfare benefits. However, as the court noted in *Ashue*, “[t]he validity of any waiver of a constitutional right, as well as the inquiry required by the court to establish waiver, will depend on the circumstances of each case, including the defendant’s experience and capabilities.” *State v. Ashue*, 145 Wn.App. at 502 (quoting *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994)). The “circumstances” of this case, as was noted in counsel’s affirmation, are that the loss of Section 8 housing was critical to the defendant. Thus, both counsel and the court’s failure to inform the defendant of those consequences vitiated her waiver of constitutional rights found in the diversion agreement. Consequently, in this case the trial court erred when it denied the defendant’s motion to vacate her conviction and set the case for trial.

II. SHOULD THE STATE PREVAIL THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFRAIN FROM IMPOSING COSTS ON APPEAL.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra*. In the case at bar the trial court found the defendant indigent and entitled to the appointment of counsel at both at trial and on appeal. CP 3-4, 65.67. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate

court itself. The Supreme Court noted:

Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: “[t]he court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing “cannot displace the court’s obligation to exercise discretion when properly requested to do so.” *Supra*.

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant’s ability to pay, as remand to the trial court not only “delegate[s] the issue of appellate costs away from the court that is

assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties.” *State v. Sinclair*, 192 Wn. App. at 388. Thus, “it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra*. The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoument of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, “[i]t is entirely appropriate for an appellate court to be mindful of these concerns.” *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis*, to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was “unable by reason of poverty to pay for any of the expenses of appellate review” and that the defendant “cannot contribute anything

toward the costs of appellate review.” *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant’s indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

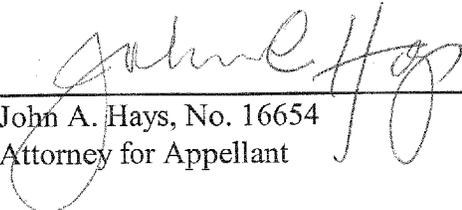
Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. In fact, the defendant is a 34-year-old single mother of two who lives off of food stamps and Social Security payments. CP 21m 65 Given the trial court’s finding of indigency at the appellate level, it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

CONCLUSION

The trial court erred when it denied the defendant's motion to vacate the conviction in this case and set the matter for trial.

DATED this 17th day of March, 2017.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

COURT OF APPEALS OF WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

NO. 49616-0-II

vs.

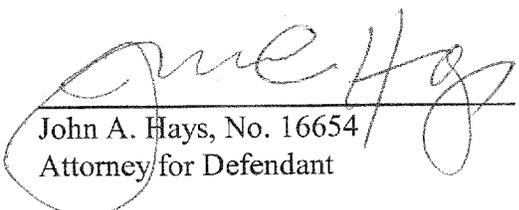
**AFFIRMATION
OF SERVICE**

**ARIANNA EISELE-CHAVEZ,
Appellant.**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 17th day of March, 2017, at Longview, WA.


John A. Hays, No. 16654
Attorney for Defendant

HAYS LAW OFFICE
March 17, 2017 - 11:57 AM
Transmittal Letter

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