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Court of Appeals
Division III
State of Washington

No. 31935-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DAVID NORMAN POLK,
Defendant/Appellant.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT
Honorable M. Scott Wolfram, Superior Court Judge

BRIEF OF APPELLANT (AMENDED)

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....6

 1. The entry of four convictions for possession violated Mr. Polk’s constitutional right against double jeopardy because the simultaneous possession of multiple photographs found in the same location constitutes a single unit of prosecution for which he is subject to a single conviction under RCW 9.68A.070.....6

 2. Mr. Polk’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of second degree dealing in depictions of a minor engaged in sexually explicit conduct in counts 2, 3 and 4.....10

 3. The possession count comprises the same criminal conduct as the dealing counts when the possession is a continuing offense and the same images of the same women form the basis of both offenses.....13

4. In light of the double jeopardy prohibition, insufficient evidence and the same criminal conduct rules, Mr. Polk's score must be based on three counts of dealing occurring on separate occasions and the resulting offender score is "6".....	16
5. The sentencing court lacked statutory authority to impose a no-contact order that was not crime related, and the order as to Roxanne Reynolds must be vacated.....	16
D. CONCLUSION.....	18

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	10
<i>In re Snow</i> , 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887).....	7, 14
<i>Bell v. United States</i> , 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955).....	7
<i>State v. Adel</i> , 136 Wn.2d 629, 965 P.2d 1072 (1998).....	6
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	16, 17

<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	11
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997), <i>cert. denied</i> , 523 U.S. 1007 (1998).....	17
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	11
<i>State v. Crediford</i> , 130 Wn.2d 747, 927 P.2d 1129 (1996).....	10
<i>State v. Elmore</i> , 143 Wn. App. 185, 177 P.3d 172, 173 (2008).....	8
<i>State v. Fisher</i> , 139 Wn. App. 578, 161 P.3d 1054 (2007).....	8
<i>State v. Hundley</i> , 126 Wn.2d 418, 894 P.2d 403 (1995).....	11
<i>State v. Knutson</i> , 64 Wn. App. 76, 823 P.2d 513 (1991).....	9
<i>State v. Mason</i> , 31 Wn. App. 680, 644 P.2d 710 (1982).....	7
<i>State v. McReynolds</i> , 117 Wn. App. 309, 71 P.3d 663 (2003).....	7, 14
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	10
<i>State v. Mullins</i> , 128 Wn. App. 633, 116 P.3d 441 (2005).....	8
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	11
<i>State v. O'Connor</i> , 87 Wn. App. 119, 940 P.2d 675 (1997).....	8
<i>State v. Ose</i> , 156 Wn.2d 140, 124 P.3d 635 (2005).....	8
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	9, 10
<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	11
<i>State v. Young</i> , 125 Wn.2d 688, 888 P.2d 142 (1995).....	8

Statutes

U.S. Const. amend. 5.....6

U.S. Const. amend. 8.....7

U.S. Const. amend. 14.....10

Const. art. 1, § 3.....10

Const. art. 1, § 9.....6

S.H.B. 2424, 51st Leg., 2010 Reg. Sess. (Wash. 2010).....9

RCW 9.68A.001.....9

RCW 9.68A.050(2)(a)(i).....2, 11, 15

RCW 9.68A.070.....6, 9

RCW 9.68A.070(2)(a).....2, 15

RCW 9.94A.030(13).....17

RCW 9.94A.505(8).....17

RCW 9.94A.589(1)(a).....13

RCW 9.94A.715(2)(a).....17

Other Resources

2012 Washington State Adult Sentencing Guidelines.....16

Note, *Twice in Jeopardy*, 75 Yale L.J. 262 (1965).....8

Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup.Ct. Rev. 81.....8

A. ASSIGNMENTS OF ERROR

1. The trial court erred and violated the constitutional prohibition against double jeopardy by entering four convictions for second degree possession of depictions of a minor engaged in sexually explicit conduct as multiple convictions.

2. The evidence was insufficient to support the convictions of second degree dealing in depictions of a minor engaged in sexually explicit conduct in counts 2, 3 and 4.

3. The court erred in calculation of the offender score.

4. The court erred in entering a no-contact order as to Roxanne Reynolds.

Issues Pertaining to Assignments of Error

1. Did the entry of four convictions for possession violate Mr. Polk's constitutional right against double jeopardy because the simultaneous possession of multiple photographs found in the same location constitutes a single unit of prosecution for which he is subject to a single conviction under RCW 9.68A.070?

2. Was Mr. Polk's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements

of the crime of second degree dealing in depictions of a minor engaged in sexually explicit conduct in counts 2, 3 and 4?

3. Does the possession count comprise the same criminal conduct as the dealing counts when the possession is a continuing offense and the same images of the same women form the basis of both offenses?

4. In light of the double jeopardy prohibition, insufficient evidence and the same criminal conduct rules, must Mr. Polk's score be based on three counts of dealing occurring on separate occasions resulting in an offender score of "6"?

5. Does a sentencing court lack statutory authority to impose a no-contact order that is not crime related?

B. STATEMENT OF THE CASE

David Norman Polk was charged and convicted by a jury of four counts of second degree dealing in depictions of a minor engaged in sexually explicit conduct, and four counts of second degree possession of depictions of a minor engaged in sexually explicit conduct. RCW 9.68A.050(2)(a)(i); RCW 9.68A.070(2)(a); CP 52–55, 86–88.

The charges arose from certain photographs taken by Mr. Polk of young women during the mid-1980's. At that time, he was building his photography business by placing ads for models and including various

types of photos in his growing portfolio. At trial four of the women, now in their 40's, testified they participated in clothed and unclothed photo "shoots" for Mr. Polk because they'd seen or heard of Mr. Polk's photography and were intrigued with thoughts of becoming models. There was disputed evidence whether they were under age 18 at the time and whether Mr. Polk had reason to know of their ages. The women did not maintain contact with Mr. Polk over the following 20-plus years. RP¹ 55–70 (DRE²); RP 76–91 (SLM); RP 92–104, 256–57 (TJH); RP 106–16 (CCM); RP 219–54 (Nancy Polk).

On December 15, 2011, Brian Bennett was contacted on his Facebook page by a friend request from "D-Man". They discovered they both knew Bennett's junior high school friend DRE. Mr. Polk sent three nude pictures of her to Bennett, saying they were adult pictures. Six (6) months later, Brian discovered from a friend that "D-Man" was Mr. Polk. He contacted DRE and police on June 8, 2012. RP 30–52, 184. The three pictures were admitted at trial as exhibits 1, 2 and 3. RP 33.

On June 15, 2012, police executed a search warrant at Mr. Polk's residence and seized computer-related evidence. RP 125–32. Among the items were seven (7) computers found in various locations within the

¹ The three volumes of report of proceedings are sequentially numbered, and references are to the page numbers.

house. RP 128–32. One computer was logged into a Facebook account of “D-Man” when the search was made and two other computers had logged in at one time to the same Facebook account. CP 129, 173.

Walla Walla Police Department Detective Michael Boettcher testified about the results of his forensic investigation. He said a slide of the picture DRE identified in testimony as her laying nude in a wheat field, had been copied or “brought onto” one of the computers on November 21, 2011. RP 59–61, 143–47. A slide of a picture SLM identified in testimony as taken when she was underage, had been scanned onto one of the computers on December 9, 2011. RP 83–85, 162–63. Several pictures CCM identified in testimony as taken when she was underage, had been scanned into a computer on December 9, 2011. RP 109–10.

Det. Boettcher described the set-up of a series of computers with a “global access network” as pretty simple and something that some grade schoolers could do. RP 179–80. There was more than one user account on machine and passwords for the accounts. RP 183. Nancy Polk and Mr. Polk have been married for 36 years, and have a daughter roughly that age. RP 219, 230, 241, 254.

² Initials are being used as required by General Order of Division III, June 18, 2012.

Regarding each of counts 1 through 4, the State specified a date of alleged dealing in the jury instructions and identified the victim in closing argument. CP 54; RP 281–84.

- *Count 1*: December 15, 2011, Brian Bennett³
- *Count 2*: November 21, 2011, DRE⁴
- *Count 3*: November 17, 2011; SLM⁵
- *Count 4*: December 9, 2011, CCM⁶

Counts 5 through 8 (possession) are identically described in the Information with the same violation date and location. CP 54–55.

Prior to trial defense counsel motioned to dismiss all but one of the possession counts based on unit of prosecution. CP 42–44. After hearing argument, the court denied the motion. RP 6–15. Prior to sentencing defense counsel renewed the unit of prosecution argument and raised additional issues including same criminal conduct and offender score calculation. CP 124–30, 139–42, 143–46. At sentencing the court declined to revisit the issues. RP 342–43. The Court granted the Department of Corrections’ request to impose an exceptional sentence. RP 342, 345. It imposed an exceptional sentence for multiple current offenses

³ Instruction No. 11 at CP 70; RP 281.

⁴ Instruction No. 12 at CP 71; RP 281.

⁵ Instruction No. 13 at CP 72; RP 282.

⁶ Instruction No. 14 at CP 73; RP 283.

under RCW 9.94A.535(2)(c), by running the concurrent sentences of 60 months on counts 1–4 consecutive to the concurrent sentences of 60 months on counts 5–8, for a total sentence of 120 months. Over defense objection, it used an offender score of 21 points on each of the 8 counts. CP 125–30, 229; RP 339.

Over defense objection the court included Roxanne Reynolds as a protected party under a no-contact order. Ms. Reynolds was not an alleged victim in this case, nor did she testify at trial. CP 49–52, 164, 195–97, 232; RP 14–15, 346–47.

This appeal followed. CP 178.

C. ARGUMENT

1. The entry of four convictions for possession violated Mr. Polk’s constitutional right against double jeopardy because the simultaneous possession of multiple photographs found in the same location constitutes a single unit of prosecution for which he is subject to a single conviction under RCW 9.68A.070.

Both the Fifth Amendment and article I, section 9 of the Washington Constitution protect against multiple punishments for the same offense. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). When a defendant is convicted of violating one statute multiple times,

“[t]he proper inquiry ... is what ‘unit of prosecution’ has the Legislature intended as the punishable act under the specific criminal statute.” *State v. McReynolds*, 117 Wn. App. 309, 334, 71 P.3d 663 (2003), citing *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955); *State v. Mason*, 31 Wn. App. 680, 685-87, 644 P.2d 710 (1982). The Legislature has the power, limited by the Eighth Amendment, to define criminal conduct and set out the appropriate punishment for that conduct. *Bell*, 349 U.S. at 82, 75 S.Ct. 620.

When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime. *See Bell*, 349 U.S. at 83-84, 75 S.Ct. 620 (double jeopardy violated when defendant convicted on two counts of transporting women across state lines when two women were transported at the same time); *In re Snow*, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887) (double jeopardy violated when defendant convicted on multiple counts of plural cohabitation when the cohabitation was continuous and ongoing). The unit of prosecution issue is unique in this aspect. While the issue is one of constitutional magnitude on double jeopardy grounds, the issue ultimately revolves around a question of statutory interpretation and legislative intent.

See Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup.Ct. Rev. 81, 113; Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 313 (1965). This is a constitutional challenge that may be raised for the first time on appeal. *State v. O'Connor*, 87 Wn. App. 119, 123, 940 P.2d 675 (1997).

The first step in determining the proper unit of prosecution is to examine the language of the statute. *State v. Ose*, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). Statutory construction is a question of law reviewed de novo. *State v. Fisher*, 139 Wn. App. 578, 583, 161 P.3d 1054 (2007). The court first looks to the statute's plain meaning to determine legislative intent. *Ose*, 156 Wn.2d at 144, 124 P.3d 635. "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Elmore*, 143 Wn. App. 185, 177 P.3d 172, 173 (2008). Statutes are construed as a whole to harmonize and give effect to all provisions when possible. *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995). "A statute is ambiguous if it can be reasonably interpreted in more than one way." *State v. Mullins*, 128 Wn. App. 633, 642, 116 P.3d 441 (2005). "If the language of a penal statute is ambiguous, the courts apply the rule of lenity and resolve the issue in a

defendant's favor." *State v. Knutson*, 64 Wn. App. 76, 80, 823 P.2d 513 (1991).

In *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009), the Washington Supreme Court analyzed the statutory language of RCW 9.68A.070 criminalizing the possession of the prohibited images and concluded that the unit of prosecution under that statute is "one count per possession of child pornography, without regard to the number of images comprising such possession or the number of minors depicted in the images possessed." 165 Wn.2d at 882. The Legislature acknowledged and ratified this holding in 2010, when it adopted specific findings in response to *Sutherby* establishing that the intended unit of prosecution for second degree offenses of possessing or dealing in prohibited images "have a per incident unit of prosecution as established in *State v. Sutherby*." RCW 9.68A.001; S.H.B. 2424, 51st Leg., 2010 Reg. Sess. (Wash. 2010). Accordingly, the unit of prosecution for both dealing and possessing prohibited images is based upon the incident of dealing or possession, without regard to the number of images or the number of individuals depicted.

In the present case, Mr. Polk was convicted of four counts of possessing based upon police seizure of his computers on June 15, 2012.

Pursuant to *Sutherby*, Mr. Polk should have been convicted of only one count of possession of the prohibited images. To convict him of any more than one count would violate the double jeopardy rule. Three of the four convictions for possession must be vacated.

2. Mr. Polk’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of second degree dealing in depictions of a minor engaged in sexually explicit conduct in counts 2, 3 and 4.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to

persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the state, could have found the elements of the crime charged beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d 418, 421–22, 894 P.2d 403 (1995).

A person may not be convicted of second degree dealing in depictions of a minor engaged in sexually explicit conduct without proof beyond a reasonable doubt that the person knowingly developed, duplicated, published, printed, disseminated, exchanged, financed, attempted to finance, or sold prohibited images. RCW 9.68A.050(2)(a)(i). Mr. Polk contends the evidence was insufficient to show he was the person

who duplicated prohibited images at the place and time alleged by the State for counts 2, 3 and 4.

The State presented no evidence that Mr. Polk digitized the images at any time. Detective Michael Boettcher said DRE's images had been copied onto one of the computers on November 21, 2011 (RP 59–61, 143–47), one of SLM's images had been scanned into one of the computers on December 9, 2011 (RP 83–85, 162–63) and several of CCM's images had been scanned into a computer on December 9, 2011. RP 109–10. The State did not identify which computers were involved, or present evidence that Mr. Polk had accessed them on the charged dates or had sole access to the computers. There were multiple computers and the detective described the set-up of a series of computers with a “global access network” as pretty simple and something that even grade schoolers could do. RP 179–80. There was more than one user account on the machines and there were passwords for the accounts. RP 183. Nancy Polk and Mr. Polk have been married for 36 years, and have a daughter roughly that age. RP 219. RP 219, 230, 241, 254. There was no evidence to refute that anyone in the household or visiting family or friends could have scanned pictures into the computers.

The State's evidence as to count 3 (SLM) established that the images were digitized on December 9, 2011, rather than on November 17, 2011 as alleged and as the jury was required to find. Instruction No. 13 at CP 72; RP 282. The State's proof on this count was further insufficient for this reason.

The State failed to prove the essential elements of the crime, and the convictions for dealing in depictions of minors as to counts 2, 3 and 4 should be reversed.

3. The possession count comprises the same criminal conduct as the dealing counts when the possession is a continuing offense and the same images of the same women form the basis of both offenses.

Should this court determine the convictions for counts 2 and 4 are supported by sufficient evidence, the three remaining charges of dealing and the single charge of possession that survives the unit of prosecution analysis represent convictions for all of the same victims.

Offenses comprising the same criminal conduct are scored as a single offense under RCW 9.94A.589(1)(a). "Same criminal conduct" means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. *Id.*

The crimes here occurred at the same time and place because the possession charge is a continuing offense. When a continuing offense is charged, it is a single offense over the entire time period during which the offense occurred. See *In re Snow*, 120 U.S. at 281-82, 7 S. Ct. 556, 30 L. Ed. 658 (unlawful cohabitation is a continuing offense that cannot be divided into multiple charges for arbitrarily selected time periods); *McReynolds*, 117 Wn. App. at 339 (separate discrete possessions of stolen property may be charged as separate units of prosecution, but the State may not divide a continuous course of possession into separate units of prosecution).

In the present case, there was no evidence presented that Mr. Polk came into new possession of new images during the time period charged. To the contrary, the State's case at trial alleged that Mr. Polk possessed the images continuously from the time he took the photographs in the 1980's and then made digital copies of the images on the dates charged in the amended information. As a further matter of common sense, Mr. Polk was necessarily in possession of the images at the time the copies were made, and that possession continued until the time that the computers were seized from his home on June 15, 2012.

Lastly, both the dealing charges and the possession charge require that the offense be committed "knowingly." RCW 9.68A.050(2)(a)(i); RCW 9.68A.070(2)(a). And the jury was so instructed in this case⁷.

In sum, when Mr. Polk copied the multiple images as charged on November 21, December 9 and December 15, 2011, he was also in possession of those images on a continuing basis at the same time and at the same place. Because the possession was continuing, as in *McReynolds*, the continuous course of possession cannot be divided into discrete acts occurring on different days. The possession that occurred on June 15, 2012 was the same possession that occurred on November 21, December 9 and December 15, 2011, involving the same images of the same women. The required mental state for the possession charge is the same required mental state for the dealing charges. Consequently, the possession charge comprises the same criminal conduct as the dealing charges for scoring purposes.

⁷ Instruction Nos. 9–19 at CP 68–78.

4. In light of the double jeopardy prohibition, insufficient evidence and the same criminal conduct rules, Mr. Polk's score must be based on three counts of dealing occurring on separate occasions and the resulting offender score is "6".

Mr. Polk has no criminal history. The scoring sheet for second degree Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct requires that other current convictions for sex offenses be multiplied by 3 points. 2012 Washington State Adult Sentencing Guidelines, Part Two – Page 235. The only scorable offenses—based on the foregoing legal authorities and arguments—are the two "other current offense" convictions for dealing. The resulting score is a "6",⁸ with a standard range sentence of 41–54 months' imprisonment.

5. The sentencing court lacked statutory authority to impose a no-contact order that was not crime related, and the order as to Roxanne Reynolds must be vacated.

The imposition of crime-related prohibitions is reviewed for an abuse of discretion. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A court abuses its discretion when its decision is manifestly

⁸ Should this court determine the conviction for count 3 (dealing) is supported by sufficient evidence, it would become a third scorable "other current offense". The resulting score would be "9", with a standard range sentence of 60–60 months' imprisonment.

unreasonable or has an untenable basis. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

A sentencing court has the discretion to impose crime-related prohibitions. *See* RCW 9.94A.030(13), RCW 9.94A.505(8), and RCW 9.94A.715(2)(a). Crime-related prohibitions include no-contact orders. *Armendariz*, 160 Wn.2d at 119. The imposition of a no-contact order prohibits conduct that relates directly to the circumstances of the crime charged. RCW 9.94A.030(13).

Over defense objection the court included Roxanne Reynolds as a protected party under a no-contact order. Ms. Reynolds was not an alleged victim in this case, nor did she testify at trial. CP 49–52, 164, 195–97, 232; RP 14–15, 346–47. This is not a crime-related prohibition. The trial court abused its discretion, and Ms. Reynolds must be removed from the no-contact order and law enforcement must be given notice of the removal.

D. CONCLUSION

For the reasons stated, the matter should be remanded for resentencing within the standard range.

Respectfully submitted on June 2, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 2, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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