

No. 55418-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM F. JENSEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard A. Jones

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

William Jensen was alleged to have solicited the murders of his wife, sister-in-law, daughter, and son. The resulting four charges of solicitation of first degree murder were based upon the testimony of a jailhouse "snitch," testimony disputed by Mr. Jensen at trial. During the prosecutor's opening portion of closing argument, the prosecutor, over defense objection, repeatedly disparaged defense counsel, claiming counsel was attempting to mislead the jury and was misstating the relevant law. The court sustained the defense objections. Mr. Jensen was subsequently found guilty as charged by the jury. At sentencing, the court imposed four consecutive sentences based upon its finding the convictions were for serious violent offenses.

On appeal. Mr. Jensen submits his right to a fair trial and right to counsel was violated by prosecutorial misconduct. Alternatively, the court violated his constitutionally protected rights to a jury trial and due process when it imposed consecutive sentences.

B. ASSIGNMENTS OF ERROR

1. The prosecutor violated Mr. Jensen's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process by committing misconduct during closing argument.

2. The trial court violated Mr. Jensen's Sixth Amendment right to a jury trial, and Fourteenth Amendment right to due process when it imposed consecutive sentences.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments guarantee an individual a fair trial before an impartial jury. Where a prosecutor engages in misconduct which seeks a verdict based on passion and prejudice, the defendant is denied a fair trial. Did the deputy prosecutor's improper comments impugning defense counsel during closing argument at trial deny Mr. Jensen a fair trial?

2. A defendant has a Sixth Amendment right to a jury trial and a Fourteenth Amendment right to proof beyond a reasonable doubt on every element of the charged offense. A fact which increases the sentence beyond the maximum sentence authorized by the jury verdict is an element of the offense and must be found by the jury beyond a reasonable doubt. Did the trial court violate Mr. Jensen's right to a jury trial when it imposed consecutive

sentences based upon a judicial finding by a preponderance of the evidence, that the offenses constituted serious violent offenses?

D. STATEMENT OF THE CASE

William Jensen and Susan Jensen had been married 22 years and had two children, a daughter 19 years of age and a son 15 years of age. 5/24/04RP 107-08. The relationship devolved into an acrimonious one, with Ms. Jensen filing for divorce in January 2001. 5/24/04RP 111. The two continued to fight over the assets of the marriage, and the acrimony led to Mr. Jensen's arrest in 2003 for felony harassment and related charges. 6/2/04RP 82.

While in King County Jail awaiting trial, Mr. Jensen befriended Greg Carpenter. 5/24/04RP 147-48, 6/2/04RP 93. Depending on the viewpoint of the two men, either one was using the other in order to curry favor with the State or *vice versa*. Carpenter contended Mr. Jensen solicited him to murder Mr. Jensen's wife, her sister, his daughter and son. 5/24/04RP 151-52. According to Carpenter, Mr. Jensen's motive was his desire to obtain his wife's substantial separate property. 5/24/04RP 152. In furtherance of this plan, Mr. Jensen provided Carpenter with \$2500 in front money. 5/25/04RP 6.

Mr. Jensen provided a different viewpoint, testifying Carpenter was a noted "jailhouse snitch" who continually pestered Mr. Jensen with offers to help him. 6/2/04RP 85-88. As Carpenter bragged about his abilities, Mr. Jensen became concerned Carpenter was planning on killing Mr. Jensen's family. 6/2/04RP 91. Thus, in order to make certain that Carpenter was imprisoned for a very long time, Mr. Jensen decided to do a reverse sting and lead Carpenter to believe he was assenting to Carpenter's plans. 6/2/04RP 93-94.

Carpenter was released from custody on July 10, 2003, and was reincarcerated on other charges several days later. 5/24/04RP 163, 5/25/04RP 10. Carpenter immediately began attempts to contact Seattle Police detective Cloyd Steiger, a police officer with whom he helped on prior occasions. 5/25/04RP 17-20. Steiger and Carpenter ultimately connected and Steiger became aware of Mr. Jensen's discussions with Carpenter about killing Mr. Jensen's family. 5/25/04RP 22. As a result of this revelation, Steiger sent another police officer, Sharon Stevens, to meet with Mr. Jensen while acting as Carpenter's girlfriend. 5/25/04RP 139. On July 24, 2003, Stevens met with Mr. Jensen at the King County Jail. 5/25/04RP 143, 5/26/04RP 80.

Based upon this meeting, Steiger obtained judicial authorization to record a subsequent meeting between Mr. Jensen and Stevens. 5/25/04RP 145. On July 26, 2003, Stevens again met with Mr. Jensen at the King County Jail, this meeting was surreptitiously recorded. 5/25/04RP 147, 5/26/04RP 98. Based upon Carpenter's revelations, and Stevens's two meetings with Mr. Jensen, Mr. Jensen was arrested and charged with four counts of solicitation to commit first degree murder. CP 1-9.

At the conclusion of Mr. Jensen's trial, during the opening portion of the State's closing argument, the prosecutor told the jury:

MS. SNOW: Mr. Jensen is not charged with the crime of Solicitation to Commit Murder in the First Degree. He's not charged with murder. I have to go back to jury selection when I had to repeatedly object to the way that counsel was misleading you about what the law was. I objected several times. The Court sustained those objections. The good news is at this point you're now provided the law and you can see the extent to which the defense was attempting to mislead you by the series of questions –

MR. CONROY: Your Honor, that's improper argument and I object.

THE COURT: Sustained counsel.

MS. SNOW: You have to ask yourself why they are attempting to mislead us –

MR. CONROY: Objection, improper.

THE COURT: Sustained.

6/4/04RP 12-13.

Mr. Jensen was subsequently convicted as charged. CP 84-87. At sentencing, the court imposed consecutive 180 months sentences, ruling:

The Court confirms the total length of commitment will be 720 months which is based upon Washington State law which provides for consecutive terms on serious violent offenses. The law has defined the charges of your crimes as serious violent offenses. That is the reason and basis for the sentence that you receive.

12/10/04RP 44.

F. ARGUMENT

1. THE PROSECUTOR'S DISPARAGEMENT OF DEFENSE COUNSEL DURING CLOSING ARGUMENT INFRINGED MR. JENSEN'S DUE PROCESS RIGHT TO A FAIR TRIAL

a. Mr. Jensen had a constitutionally protected right to counsel and a right to a fair trial. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict

free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *Davenport*, 100 Wn.2d at 762.

In addition, because defendants have a Sixth Amendment right to the effective assistance of counsel, personally attacking defense counsel may rise to the level of constitutional error. *Bruno*

v. Rushen, 721 F.2d 1193 (9th Cir.1983)(*per curiam*), *cert. denied sub nom, McCarthy v. Bruno*, 469 U.S. 920 (1984).

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245, *cert. denied*, 518 U.S. 1026 (1996). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." *Id.*

b. The prosecutor disparaged the role of defense counsel during closing argument. The prosecutor's comments maligned defense counsel, telling the jury that counsel was attempting to mislead them. The prosecutor's comments regarding defense counsel were meant to impute guilt to Mr. Jensen. "No prosecutor, however, may impugn the integrity of a particular lawyer or that of lawyers in general, without basis in fact, as a means of imputing guilt to a defendant." *United States v. McDonald*, 620 F.2d 559, 564 (5th Cir.1980). "Neither is it accurate to state that defense counsel, in general, act in underhanded and

unethical ways, and absent specific evidence in the record, no particular defense counsel can be maligned.” *Bruno*, 721 F.2d at 1195.

In a case with similar arguments by the prosecutor, the Second Circuit reversed a defendant’s narcotics conviction. *United States v. Friedman*, 909 F.2d 705 (2nd Cir.1990). In closing, the prosecutor referred to the defense’s failure to present evidence and said that “one of the witnesses in this case was Mr. Goldberger [defense counsel].” *Id.* at 707. Returning to this theme later in the argument, the prosecutor referred to “Mr. Goldberger’s testimony, unsworn as it was.” *Id.* Finally, in attempting to discredit a defense witness, the prosecutor referred to “the defendant’s witness, Mr. Goldberger,” and “the testimony of Mr. Goldberger.” *Id.* At the conclusion of argument the defense unsuccessfully moved for a mistrial. *Id.* at 708.

The Circuit Court reversed, finding the prosecutor’s argument constituted misconduct. *Friedman*, 909 F.2d at 710.

By repeatedly characterizing defense counsel as a “witness” and his opening statement as “unsworn testimony,” the prosecutor was urging the jury to ignore defense counsel’s entirely legitimate role as an advocate, discharging as important a responsibility in representing the defendant as the prosecutor has in representing the United States.

Id. at 709.

Similarly, in *Bruno*, during closing argument the prosecutor implied that the sudden reversal of a witness's memory was a direct product of her consultation with defense counsel before she testified. The prosecutor also implied that all defense counsel are retained solely to lie and distort the facts and camouflage the truth in an attempt to confuse the jury about their client's involvement in the charged crimes. The Circuit Court granted Mr. Bruno's federal *habeas corpus* petition, finding the prosecutor's arguments violated his right to counsel. *Bruno*, 721 F.2d at 1195. The Court noted that:

such tactics unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice and we readily presume because the principle is so fundamental that all attorneys are cognizant of it. Any abridgment of its sanctity therefore seems particularly unacceptable.

Id.

In *State v. Gonzales*, this Court reversed a conviction where the prosecutor's argument was very similar to the argument here. 111 Wn.App. 276, 283-84, 45 P.3d 205 (2002). In *Gonzales*, the prosecutor told the jury

I have a very different job than the defense attorney . . .
. I have an oath and an obligation to see that justice is served . . . Justice, that's my responsibility and justice is holding him responsible for the crime he committed.

Id. at 283.

Although the trial court overruled the objection as “not well taken,” this Court reversed the conviction, finding the prosecutor’s argument to be misconduct. *Id.* at 284. Relying on the Fifth Circuit’s decision in *United States v. Frascone*, 747 F.2d 953 (5th Cir. 1984),¹ the court reasoned the prosecutor’s argument established in the jurors’ minds “the false notion that unlike defense attorneys, prosecutor’s take an oath ‘to see that justice is served.’” *Gonzales*, 111 Wn.App. at 283-84. The Court found that “[s]uch an argument clearly has the potential to affect the verdict, which would necessitate reversal.” *Id.*

Here, the prosecutor’s argument was even more egregious. The prosecutor continually told the jury that the defense was attempting to mislead them, and even after an objection to the improper argument was sustained by the court, the prosecutor

¹ In *Frascone*, the prosecutor argued “I take an oath to see that justice is done. [The defense] take an oath to represent their client zealously.” *Frascone*, 747 F.2d at 957. The district court immediately sustained the defense objection to the argument and directed the jury to disregard the argument, a fact critical to the appellate court’s refusal to reverse the conviction. *Id.* at 957-58.

could not help herself and picked up where she left off. The argument was clearly misconduct. *Gonzales*, 111 Wn.App. at 284.

c. The prosecutor's disparagement of defense counsel, infringed upon Mr. Jensen's Sixth Amendment right to counsel and right to present a defense, and must result in the reversal of his convictions. Typically, appellate courts examine whether prosecutorial misconduct denied the defendant a fair trial and reverse if there is a substantial likelihood that the comments affected the verdict. *State v. Contreras*, 57 Wn.App. 471, 473, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014 (1990), *quoting State v. Traweek*, 43 Wn.App. 99, 107-08, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986). When a prosecutor's comments also affect a separate constitutional right, they are subject to the stricter standard of constitutional harmless error. *Id.* This Court must reverse Mr. Jensen's conviction and remand for a new trial unless this Court concludes the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "The State's burden to prove harmless error is heavier the more egregious the conduct is." *State v. Rivers*, 96 Wn.App. 672, 676, 981 P.2d 6 (1999).

Both of the courts in *Friedman* and *Bruno* considered whether the prosecutor's misconduct during closing argument was harmless and concluded it was not. *Friedman*, 909 F.2d at 710; *Bruno*, 721 F.2d. at 1195. In *Friedman*, the Court noted each case must be assessed on its individual circumstances but that the Court could not "confidently say a conviction [in that case] would surely have been obtained in the absence of the misconduct." *Friedman*, 909 F.2d at 710.

Similarly, in *Bruno* the Court found the error not to be harmless where:

[t]he improper remarks were made at an important stage of the trial and were extensive. They were not accidental but calculated to wrongly impute guilt to the defendants.

Bruno, 721 F.2d at 1195.

Here, the prosecutor impugned defense counsel which alone is sufficient to require a reversal. *Gonzales*, 100 Wn.App. at 284. As a consequence, the misconduct by the prosecutor cannot be deemed harmless and must result in the reversal of Mr. Jensen's convictions.

2. BASED UPON ITS FACTUAL FINDING, THE TRIAL COURT INCREASED THE PUNISHMENT TO WHICH MR. JENSEN WAS EXPOSED AND VIOLATED HIS RIGHT TO A JURY TRIAL AND DUE PROCESS OF LAW

a. Any fact which increases the punishment to which a criminal defendant is exposed must be proved to a jury beyond a reasonable doubt. The Sixth Amendment right to a jury trial and the Due Process Clause of the Fourteenth Amendment entitle a criminal defendant to a jury determination of every element of an offense with which he is charged on the basis of proof beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *citing United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

These constitutional rights, by definition, limit the punishment to which criminal defendants are exposed. The Sixth Amendment protects criminal defendants from exposure to penalties “*exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” *Apprendi*, 530 U.S. at 483 (emphasis in original). Likewise, the Due Process Clause of the Fourteenth Amendment protects criminal defendants from an increased sentence based upon facts not formally pleaded, submitted to a jury, and proven beyond a reasonable doubt. See

Specht v. Patterson, 386 U.S. 605, 609-11, 87 S.Ct. 1209, 18

L.Ed.2d 326 (1967). As such,

it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 490, quoting *Jones v. United States*, 526

U.S. 227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)

(Stevens, J., concurring). In other words, a court's ability to impose

a sentence is limited to the maximum allowed by the jury verdict

alone. *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S.Ct.

2531, 159 L.Ed.2d 403 (2004). "When a judge inflicts punishment

that the jury's verdict alone does not allow, the jury has not found

all the facts 'which the law makes essential to punishment.'" *Id.*

(italics in original), citing, 1 J. Bishop, *Criminal Procedure*, § 87,

p.55 (2d ed. 1872).

b. The "separate and distinct criminal conduct" finding of fact exposes criminal defendants to enhanced punishment and thus must be made by a jury beyond a reasonable doubt. The Sentencing Reform Act (SRA) presumes sentences for multiple offenses "shall be served concurrently." RCW 9.94A.589 (1)(a).

Under the statute, the presumption of concurrent sentences may be overcome by a judicial finding that the offenses arose from “separate and distinct criminal conduct.” Throughout the SRA, judicial findings of fact are based upon a preponderance of the evidence, and there is no requirement courts employ a different standard of proof in assessing whether conduct is separate and distinct. See, e.g., RCW 9.94A.500 (instructing courts to make findings regarding prior convictions by preponderance); RCW 9.94A.530 (2) (authorizing court to base exceptional sentence on facts proved by preponderance); *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004) (under SRA, State must prove existence and comparability of prior out-of-state conviction by preponderance). In those cases where the court finds “separate and distinct” conduct, it must impose consecutive sentences. RCW 9.94A.589 (1)(b).

Initially, it is clear the court erred in not conducting the two-step process. 12/10/04RP 44. Here the court presumed the fact the offenses were serious violent offenses required it to impose consecutive sentences. *Id.* This was incorrect. The court was required to make the additional finding that the offenses were “separate and distinct,” which it clearly failed to do. RCW 9.94A.589(1)(b).

Nevertheless, here, the presumptive sentence for Mr. Jensen was 180 months. CP 130, 132; RCW 9.94A.589 (1)(a). Mr. Jensen was exposed to an *additional* 540 months imprisonment based upon the implied judicial finding of fact that the offenses arose from “separate and distinct” conduct. CP 132. Once the court made any other decision other than imposing the 180 month concurrent presumptive sentence, it violated *Blakely*. *Blakely*, 542 U.S. at 302 (“The relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without any additional findings*.”) (Italics in original).

Because this finding of fact increased the sentence to which Mr. Jensen was exposed, the Sixth and Fourteenth Amendments, as conceived by the Framers, required the State to prove the fact to a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 497 (finding exposure to increased punishment based upon fact never proved to jury beyond reasonable doubt to be “an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system”); *Blakely*, 542 U.S. at 313-14, *quoting* 4 Blackstone, Commentaries on the Laws of England 343 (1769).

c. This Court's decision in *Cubias* ignored the clear impact of *Blakely* and *Apprendi* and must be reexamined. The Supreme Court recently rejected a challenge similar to the claim raised by Mr. Jensen in *State v. Cubias*, ___ Wn.2d ___, 120 P.3d 929, 2005 Wash. LEXIS 800 (2005). In so doing, the Supreme Court correctly conceded that consecutive sentences increase the defendant's aggregate term of imprisonment. *Cubias*, at 8. But the Court incorrectly concluded that since the sentence for the individual offenses did not exceed the statutory maximum, *Blakely* is not implicated. *Id.*

This reasoning regarding the statutory maximum is faulty. See, e.g., *Wright v. Alaska*, 46 P.3d 395, 398 (Alaska 2002) (affirming sentence where consecutive sentence was within statutory maximum, although exceeding presumptive sentence); compare *Blakely*, 542 U.S. at 301-02 (clarifying "statutory maximum" for *Apprendi* purposes is maximum sentence judge may impose based solely on jury's verdict, to wit, sentence within standard range determined by legislature).

In *Apprendi*, the Court did not consider the application of the articulated rule to consecutive sentences. In defense of its practice, New Jersey argued there was no error, as the sentencing

court *could* have imposed consecutive sentences on the other two counts and achieved the same ultimate result. 530 U.S. at 474.

The United States Supreme Court disagreed.

The constitutional question . . . is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count. . . . The sentences on counts 3 and 22 have no more relevance to our disposition than the dismissal of the remaining 18 counts.

Id. Contrary to the Supreme Court's conclusion, this statement does not authorize the imposition of consecutive sentences based upon a judicial finding of fact. Rather, it recognizes the action the trial court actually took – imposition of an enhanced sentence on a single count. *Id.* at 471. Additionally, unlike RCW 9.94A.589, the relevant New Jersey statute afforded the trial court unbridled discretion in imposing consecutive sentences. N.J.S.A. 2C:44-5 (a). As such, and as discussed above, it does not implicate the same constitutional concerns presented here.

Finally, as ruled in *Blakely*, the relevant statutory maximum is not that which the legislature stated but the maximum sentence the court could impose with no additional findings. *Blakely*, 542 U.S. at 301-02. The fact the two underlying sentences in *Cubias* were within the statutory maximum is not the issue, the issue is

whether the court could impose the consecutive sentence without any additional finding. The court's finding that the offenses were "separate and distinct" is just such a finding barred by *Blakely*.

Mr. Jensen, like Mr. Blakely, had the constitutional right to a jury trial and due process of law. These constitutional rights are violated when the legislature defines the punishment for a particular offense or offenses, and provides for increased punishment based upon the finding of some fact by a judge, not a jury, by a preponderance of the evidence, not beyond a reasonable doubt. *Apprendi*, 530 U.S. at 491-2; *Blakely*, 542 U.S. at 301-02.

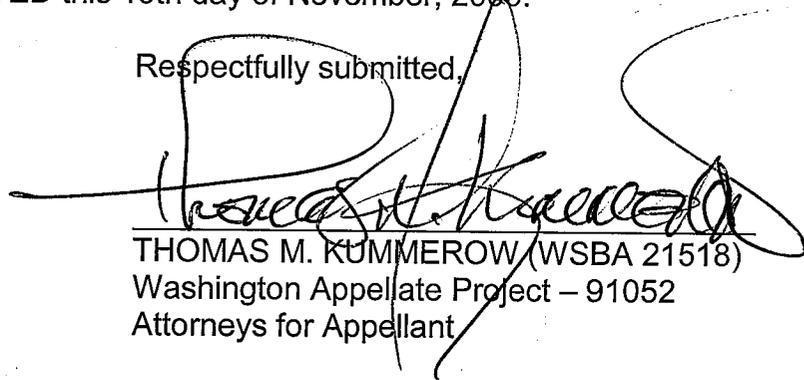
d. The error in sentencing Mr. Jensen to consecutive sentences can never be harmless. Harmless error does not apply to sentences which violate *Apprendi* and *Blakely*. See *State v. Hughes*, 154 Wn.2d 118, 148, 110 P.3d 192 (2005) ("Harmless error analysis cannot be conducted on *Blakely* Sixth Amendment violations."). Thus, this Court must reverse Mr. Jensen's consecutive sentences and cannot attempt to "save" the sentence by applying a harmless error test.

F. CONCLUSION

For the reasons stated, Mr. Jensen submits this Court must either reverse his convictions and remand for a new trial, or reverse his sentence and remand for imposition of a 180 month sentence.

DATED this 15th day of November, 2005.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and address below. The signature is highly cursive and loops around the text.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
) RESPONDENT,)
)
) v.) COA NO. 55418-2-1
)
) WILLIAM JENSEN,)
)
) APPELLANT.)

DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 15TH DAY OF NOVEMBER, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF NOVEMBER, 2005.

X _____ 

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