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NO. 57691-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

84982-0

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Appellant.

2006 DEC 19 PM 4:27
COURT OF APPEALS
STATE OF WASHINGTON

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Strictly adhering to its categorical refusal to continue the trial, the court rejected several reasonable requests to grant Oliver Weaver's attorney time to investigate the case, even when the proffered evidence was necessary and material to the defense. Also, the court unreasonably refused defense counsel's request to withdraw based on an irreconcilable conflict of interest without conducting an adequate inquiry.

The court further erred by including two "washed out" prior offenses in Mr. Weaver's offender score and impermissibly imposed an exceptional sentence above the standard sentencing range without statutory authority.

B. ASSIGNMENTS OF ERROR.

1. The trial court denied Mr. Weaver his right to assistance of counsel under the Sixth Amendment and Article I, section 22 of the Washington Constitution.

2. The trial court violated Mr. Weaver's right to present a defense, contrary to the Sixth and Fourteenth Amendments and Article I, sections 3 and 22.

3. The court improperly calculated Mr. Weaver's offender score.

4. The court violated Mr. Weaver's state and federal constitutional rights to trial by jury by imposing an exceptional sentence.

5. The court lacked statutory authority to impose an exceptional sentence above the standard sentencing range.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The constitutional guarantee of assistance of counsel includes the right to an attorney prepared to advocate on the client's behalf and the right to present a defense. Here the court repeatedly denied requests for a trial continuance based on a perception that no further delay would be allowed for any reason, even though defense counsel had numerous valid reasons to request more time in order to present a valid defense. Did the court's refusal to continue the trial deprive Mr. Weaver of his rights to counsel and to present a defense?

2. The right to assistance of counsel also requires the court to insure that there is no conflict of interest that prohibits the attorney from being an effective advocate. Here, defense counsel told the court that he could no longer represent Mr. Weaver based on a complete breakdown in trust that resulted from alleged financial fraud by Mr. Weaver. Did the court deny Mr. Weaver his

right to assistance of conflict-free counsel by refusing to adequately inquire into the breakdown of attorney-client relations and by failing to insure defense counsel would effectively advocate for Mr. Weaver?

3. The court must properly calculate a defendant's offender score prior to sentencing. In the case at bar, the court included several decades-old offenses in the offender score without any proof they met the statutory requirements of valid prior criminal convictions. When the offenses plainly should have "washed" for purposes of the offender score, did the court incorrectly rely on prior offenses in calculating Mr. Weaver's offender score?

4. The court's sentencing authority is limited by statute and the constitutional requirements of a fair trial by jury. In the instant case, the court imposed an exceptional sentence absent statutory authority for such a sentence. Did the court improperly impose a sentence greater than the standard range?

D. STATEMENT OF THE CASE.

When she was 13 years old, R.T. worked for Oliver Weaver in his car sales business and sometimes cleaned his home.

2/16/05RP 167, 169-70.¹ In March of 2003, R.T. discovered she was pregnant and accused Mr. Weaver of forcible non-consensual sexual intercourse occurring in early December 2002. 2/16/05RP 188. R.T. had not revealed the sexual assault to anyone until she learned she was pregnant, and she explained that she did not report the incident earlier because she feared Mr. Weaver would harm her or anyone she told. 2/16/05RP 181, 186. DNA testing of the fetus was consistent with Mr. Weaver's genetic code. 2/22/05RP 283-84.

R.T. terminated the fetus on March 21, 2003. 2/16/05RP 93, 105. Doctors measured the fetus and estimated it was approximately 11 weeks old. 2/16/05RP 105; 2/17/05RP 220-22. R.T. insisted Mr. Weaver assaulted her on December 8, 2002, which would have made the fetus approximately 15 weeks old at the time of termination. 2/16/05RP 172.

Before trial, the court denied Mr. Weaver's attorney's request for a continuance based on his inadequate preparation. 2/14/05RP 12. After pre-trial proceedings but before any trial testimony, the court denied defense counsel's request to withdraw

¹ The verbatim report of proceedings ("RP") will be referred to herein by the date of proceeding, followed by the page number.

based on a financial and professional conflict of interest, denied Mr. Weaver's request for a new attorney, and denied a further request for a continuance to determine whether Mr. Weaver's sterility made it impossible for him to father a child. 2/16/05RP 86-89; 2/22/05RP 327.

After a jury trial before Judge Sharon Armstrong, Mr. Weaver was convicted of one count of rape of a child in the second degree and one count of second degree rape. CP 39-40. Both counts were based on a single event and the court sentenced the offenses as the same criminal conduct. 4/8/05RP 372-73; CP 78.

Over Mr. Weaver's objection, the court obtained a special verdict from the jury, finding that the defendant impregnated the child victim. CP 38. Based on this finding, the court imposed an exceptional sentence of 250 months. 4/22/05RP 381-82; CP 70-73. This appeal timely follows. CP 86-111.

Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. BY REFUSING TO PROVIDE MR. WEAVER WITH NEW COUNSEL OR A CONTINUANCE DESPITE WELL-FOUNDED CLAIMS OF INADEQUATE ATTORNEY PREPARATION, A CONFLICT OF INTEREST, AND THE RIGHT TO PRESENT A DEFENSE, THE COURT DENIED MR. WEAVER HIS RIGHT TO COUNSEL AND DUE PROCESS OF LAW

a. A criminal defendant has the right to representation by an effective advocate. The Sixth Amendment of the federal constitution² and Article I, section 22 of the Washington Constitution³ protect an accused's right to counsel at all critical stages of a criminal proceeding. United States v. Gonzalez-Lopez, U.S. __, 126 S.Ct. 2557, 2561, 165 L.Ed.2d 409 (2006); State v. Harrell, 80 Wn.App. 802, 804, 911 P.2d 1034 (1996). While accused persons are not guaranteed the right to have good rapport with their attorneys, they are guaranteed representation by "an effective advocate" with whom they have no irreconcilable conflicts. Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

² The Sixth Amendment protects an accused's right "to have Assistance of Counsel for his defense."

³ Article I, section 22 of the Washington Constitution provides that, "in criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

A trial court may not permit a criminal defendant to be represented by an attorney with whom there is an irreconcilable conflict of interest. In re Personal Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (court must adequately inquire into extent of conflict); see also United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002) (“For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant ‘privately and in depth.’”).

Although a trial court has broad latitude to deny a motion for substitution of counsel, this discretion must be balanced against the accused’s Sixth Amendment right. Nguyen, 262 F.3d at 1003.

To compel one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.

Stenson, 142 Wn.2d at 759 (Sanders, J., dissenting) (citing United States v. Williams, 594 F.2d 1258, 1260 (9th Cir. 1979)).

Additionally, an accused person has the right to a fair trial at which he has a meaningful opportunity to present a defense.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). Concerns with expediency do not trump an accused

person's rights to a fair trial and competent counsel. Nguyen, 262 F.3d at 1003.

A court's ruling denying a continuance or a request for a new attorney are reviewed for an abuse of discretion. Stenson, 142 Wn.2d at 733. An abuse of discretion occurs when a court's ruling is based on facts that are not supported by the record, an incorrect understanding of the law, or an unreasonable view of the issues presented. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

b. The court impermissibly refused to grant a continuance. The court's discretion to grant a continuance on the eve of trial must be balanced against the accused person's rights to counsel and to a fair trial. Nguyen, 262 F.3d at 1003. "An unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." Id. (quoting Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983)).

In the case at bar, the trial judge claimed she was instructed by the presiding judge not to grant a continuance if Mr. Weaver asked for one. The trial court believed it had no independent authority to evaluate whether a continuance was warranted, since

the judge who referred the case had said to “deny any second request for a continuance that defense counsel might make. So that’s what I’ll have to do.” 2/14/05RP 9. The court added, “I really don’t have the authority to give a continuance.” *Id.* at 12. The court’s refusal to even consider a continuance, despite various issues that arose during trial that necessitated a continuance, was manifestly unreasonable and contrary to the rights guaranteed by the Sixth Amendment and Article I, section 22.

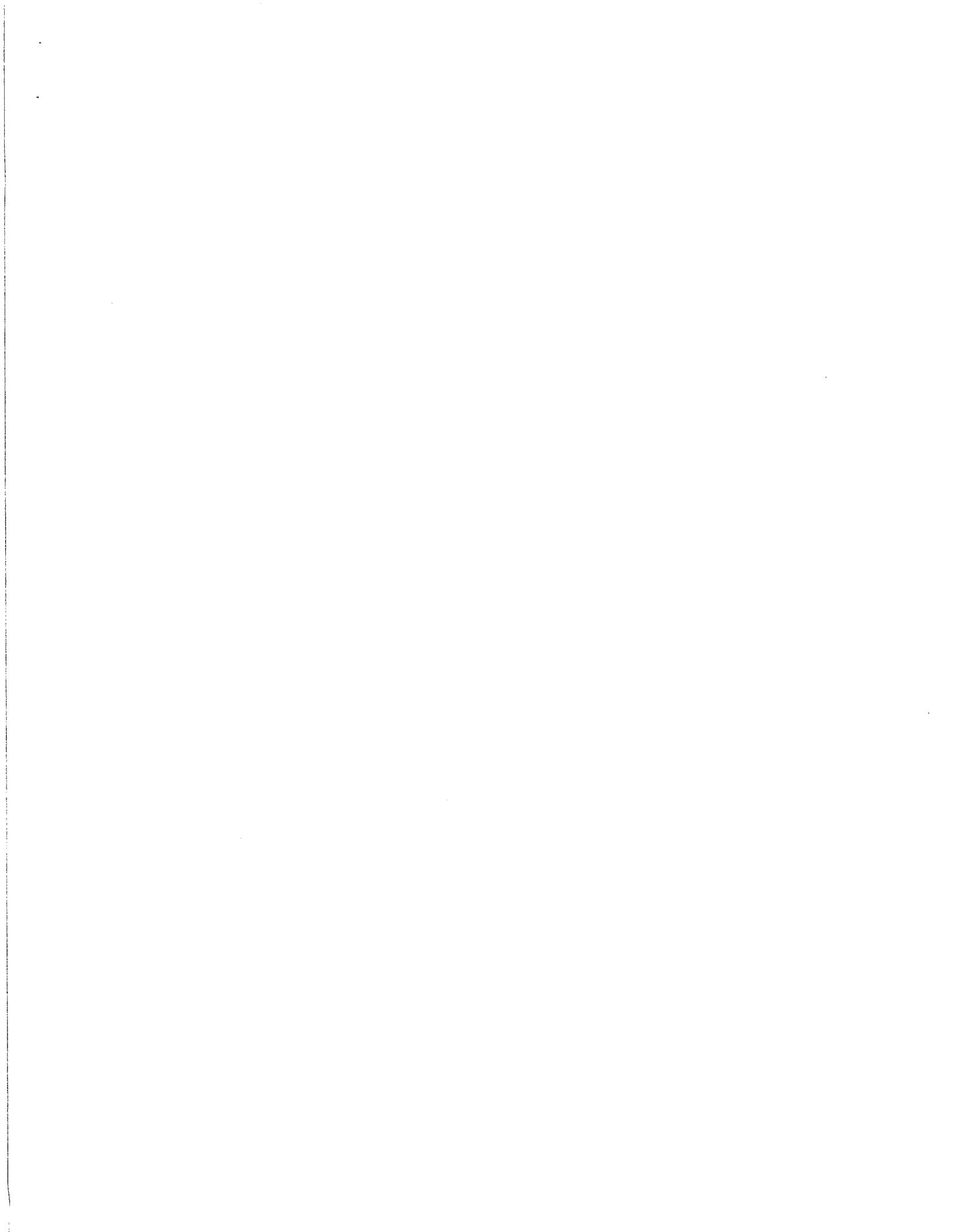
i. The court’s categorical refusal to consider a request for a continuance was an abuse of discretion. The failure to exercise discretion is an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (categorical refusal to consider legally available sentencing option is abuse of discretion).

As soon as defense counsel appeared before the trial judge, he explained he needed a continuance on the grounds that he was woefully unprepared and had not expected the trial to begin for at least one month. 2/14/05RP 7-8. His lack of preparation was most disabling to the defense on the issue of DNA testimony, which the prosecutor described as the “crux” of the case. *Id.* at 11. Mr. Gehrke explained, “I’m very uncomfortable not being prepared for the DNA lady. And it will take more than a couple of evenings to

get ready.” Id. at 8. Defense counsel offered a long list of potential witnesses, but admitted he had not spoken to most of these witnesses. Id. at 23-28. He also needed to speak with Mr. Weaver in detail and hire a DNA expert. Id. at 8.

Even the prosecutor recognized the flaw in the court’s *per se* no-continuance policy. The prosecutor opposed the continuance but said, “the defense has to do what they have to do. The last thing we want to have happen here is a finding by some court down the line that Mr. Gehrke was ineffective for not being allowed to do this [additional investigation].” Id. at 11. The prosecutor further admitted it was difficult to schedule interviews with its DNA witness, who had been out of the office, as well as with the physician who would testify about the abortion and the age of the fetus, as she works in California several days of every week in addition to her Washington practice. Id. at 10-12. Mr. Weaver also filed with the court a list of complaints he had with Mr. Gehrke’s inadequate trial preparation, including not speaking with witnesses or even speaking with himself about the allegations. CP 34-37.

During pre-trial proceedings, prior to Mr. Gehrke’s request for additional time to prepare, the case had been delayed numerous times. Mr. Weaver suffered several heart attacks during





the pendency of the case, had a tonsillectomy, and his young daughter suffered from seizures, all of which required substantial medical attention. 2/16/05RP 81; 8/19/05RP 17; Supp CP __, sub. nos. 119 (continuance for tonsillectomy); 133A (heart attack); 139 (heart attack); 146 (medical problems), 149 (heart attack).

In addition to the unanticipated and serious health problems Mr. Weaver suffered, Mr. Weaver had difficulties with his retained attorneys. His first attorney John Crowley requested numerous continuances to investigate the case but did little if any investigation, which the prosecutor conceded. 8/19/04RP 2-3; 2/14/05RP 76. Mr. Weaver had a conflict of interest with his second attorney, Peter Friedman, based on a fundamental disagreement over Mr. Friedman's handling of the case which resulted in a complete breakdown in their relationship. 8/19/04RP 7; 2/14/05RP 77. Then Mr. Friedman refused to provide him with information necessary for obtaining another attorney, which also delayed his retention of counsel. 8/5/04RP 9; 8/19/04RP 7. His trial attorney, David Gehrke, was retained in September 2004, but had done little preparation by the February 12, 2005, trial date. 2/14/05RP 7-8.

While a trial court has legitimate concerns with efficiency, it may not use such concerns to deny a defendant the effective assistance of counsel or the right to present a defense. It is clear from the record that the court denied the continuance primarily because the court believed it lacked the authority to grant a continuance, as the presiding judge had instructed it not to continue the case for any reason. See Grayson, 154 Wn.2d at 342 (since court's primary reason in denying DOSA was its categorical refusal to consider this sentencing option, court improperly failed to exercise discretion). The court's wholesale refusal to consider a continuance for necessary trial preparation was manifestly unreasonable.

ii. The court untenably refused to substitute counsel despite a significant conflict of interest. The court strictly adhered to its "no continuance" policy even when presented with further grounds to question whether Mr. Weaver was receiving his right to an effective advocate. Before any witnesses began testifying in the case, Mr. Gehrke requested a hearing without the prosecutor's presence, in which he revealed to the court that there was an irreconcilable conflict of interest that rendered him unable to advocate for Mr. Weaver. 2/16/05RP 65. Mr. Gehrke explained

that Mr. Weaver had been substantially delinquent in paying his fee, and had recently given him bonds that appeared fake. Id. at 70-71. Mr. Gehrke researched the bonds, and had his investigator and secretary also research the legitimacy of the bonds, and concluded that Mr. Weaver was trying to defraud him. Id. at 72-73. Mr. Gehrke was “pissed off” and uninterested in representing Mr. Weaver any longer because of this issue. Id. at 74.

When presented with an irreconcilable conflict between attorney and client, the court must inquire “in private and in depth” about the nature of the rift and whether it inhibits the accused from receiving effective advocacy. Nguyen, 262 F.3d at 1003, 1005; see also United States v. Adelzo-Gonzalez, 268 F.3d 772, 778 (9th Cir. 2002) (to properly evaluate attorney-client conflict, trial court must “probe more deeply into the nature of the relationship” between defendant and counsel beyond assessing attorney’s preparedness); Moore, 159 F.3d at 1160 (merely giving “both parties a chance to speak and ma[king] limited inquiries to clarify” not sufficient to show court adequately understood “the extent of the breakdown.”).

In State v. Fleck, 49 Wn.App. 584, 588, 744 P.2d 628 (1987), rev. denied, 110 Wn.2d 1004 (1988), the court denied

defense counsel's request to withdraw based on his perception that his client would perjure himself. The Fleck Court set out several factors the court should consider when determining whether to remove an attorney from a case. These factors include: (1) the degree of preparation already engaged in by counsel; (2) "counsel's recognition of his duty to zealously represent the defendant and his assurance to the court that he would do so;" and (3) the delay it would cause to substitute counsel. Id.

In the case at bar, the court listened to Mr. Gehrke's complaints. Mr. Gehrke told the court that the phony bonds, on top of other difficulties he had with Mr. Weaver, left him "just pissed" at Mr. Weaver. 2/16/05RP 74. Mr. Gehrke had people lie to him in the past, "[b]ut when I'm deliberately set up and I'm given phony paper and all these stories and stuff like that, I can't even – I don't want to be with him, I can't deal with him." Id. at 74.

In addition to feeling upset about not being paid, Mr. Gehrke no longer trusted Mr. Weaver about substantive matters. Id. at 75. Mr. Weaver gave him substantive notes regarding witnesses, and Mr. Gehrke felt, "I can't deal with that during trial and quite frankly, I don't know what his motives are. I suspect them, but I have no proof that he's deliberately trying to defraud me." Id. at 75.

Thus, “the bottom line is I’m being defrauded and that’s sort of like the straw that’s broken the camel’s back.” Id. at 75. Mr. Gehrke elaborated, “I can’t be the advocate I need to be for my client.” Id. In addition to the fact that, “I was ill-prepared to start this trial,” Mr. Gehrke completely lacked trust in his client and felt unable to represent him any longer. Id. at 75-76.

While explaining the conflict of interest, Mr. Gehrke revealed private information to the court, criticizing Mr. Weaver’s relationship with various counsel and his dilatory tactics in the case at bar. Id. at 69-71. He told the court that Mr. Weaver was hiding information from him and providing the rest of the information extremely late. Id. at 71.

Mr. Weaver explained that he believed the bonds were lawful and he was trying to pay Mr. Gehrke the best he could. Id. at 78-79. He said he had not purposefully delayed the case when he changed lawyers earlier in the proceedings. Id. at 76-77. Yet if Mr. Gehrke was going to be upset about not being paid, Mr. Weaver did not want him to represent him, and he further complained that Mr. Gehrke had not been responding to his telephone calls or otherwise doing his job. Id. at 82. At the end of the court’s

colloquy, Mr. Gehrke continued to insist that Mr. Weaver was engaging in fraud. Id. at 85.

Rather than resolving the conflict during the *ex parte* proceedings, the court asked the prosecutor to return to the courtroom after hearing Mr. Gehrke and Mr. Weaver speak. Id. The judge then said she was “disinclined to let the attorney withdraw,” based on the fact he had not been paid and felt defrauded. Id. at 86. The court said it would ask the Office of Public Defense (OPD) for temporary funds, and “I’m more concerned about this trial actually getting finished.” Id. at 86-87. The court further instructed Mr. Weaver that it knew Mr. Gehrke was a competent attorney and suspected Mr. Weaver was trying to delay a jury verdict. Id. at 88. The court denied the motion to withdraw. Id. at 88-89.

The court’s inquiry in the case at bar was fundamentally inadequate. Unlike Fleck, the court did not obtain any assurance from Mr. Gehrke that he would zealously represent Mr. Weaver despite the conflict of interest. On the contrary, Mr. Gehrke told the court that, “I can’t be the advocate I need to be for my client.” 2/16/05RP 75. In light of this express disavowal of an ability to effectively advocate for Mr. Weaver, the court erred by refusing to

substitute counsel. See Plumlee v. Del Papa, 465 F.3d 910, 928 (9th Cir. 2006) (finding irreconcilable conflict where defense counsel told court “[H]e doesn’t trust us and, frankly, Judge, I don’t trust the relationship that I have with Mr. Plumlee.”); Moore, 159 F.3d at 1160 (irreconcilable conflict where attorney admitted “if Mr. Moore is forced to go to trial now with me as his attorney, that he will be denied a fundamental right; that is, to have counsel, effective, a zealous counsel.”)

Furthermore, Mr. Gehrke had not engaged in extensive preparation. He had repeatedly informed the court he was “ill-prepared,” had not expected the case to go to trial for another month, and had not conducted necessary investigation. 2/14/05RP 7-8; CP 32-33. Thus, the attorney’s experience with the case was not valid grounds for refusing to substitute counsel.

In addition, the court did not expressly inquire into the delay that would follow appointing new counsel. Most likely, the court’s hostile reaction to the request to withdraw was based on its perception, stated earlier, that no continuances of the case should be allowed for any reason, in addition to Mr. Gehrke’s complaints about Mr. Weaver during the *ex parte* hearing. 2/14/05RP 12.

Mr. Gehrke's complaints about his client to the judge could only underscore the breakdown in attorney-client relations, yet the court did not inquire into the nature of this problem or weigh counsel's conflicted interest in advocating on behalf of Mr. Weaver when denying the motion to withdraw. Mr. Gehrke's dissatisfaction with Mr. Weaver rose to the level that he blamed Mr. Weaver's lack of cooperation as the reason he was not better prepared and accused Mr. Weaver of intentionally delaying the proceedings. These arguments were plainly contrary to counsel's role in zealously representing Mr. Weaver's interests. See Harrell, 80 Wn.App. at 805 (defendant effectively denied counsel when defense attorney does not advocate on his behalf at plea withdraw hearing).

Moreover, the fact that delay may result from a change in counsel is not grounds for denying the right to conflict-free counsel. Where defense counsel has an irreconcilable conflict of interest or a complete breakdown in trust with his client, the client is denied the "clearly established Sixth Amendment right to have an attorney 'acting in the role of an advocate.'" Plumlee, 465 F.3d at 922 (citing Anders v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)).

iii. The court denied Mr. Weaver the right to present a defense by refusing to permit him time to offer testimony about his sterility. In addition to the right to counsel, the Sixth Amendment and the Washington State Constitution protect an accused person's right to obtain witnesses and present a defense. A criminal defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting Washington v. Texas, 388 U.S. at 19); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

At the inception of his representation by Mr. Gehrke, Mr. Weaver informed him that he was sterile and thus could not have impregnated the complainant. 2/17/05RP 159. Mr. Gehrke did not recall Mr. Weaver informing him of this information until trial started, although he thought it was possible Mr. Weaver told him about this earlier and he simply forgot. Id.; 2/22/05RP 322.

During trial, Mr. Weaver supplied the court with test results from a fertility laboratory that showed Mr. Weaver had an extremely low level of sperm and the laboratory's doctor told the investigator, "there's no way Mr. Weaver could impregnate anyone today."

2/22/05RP 319. Mr. Gehrke also located adoption placement papers from 2000, which documented the Weavers' efforts to have a child and found there were no clear explanations as to why Mr. Weaver's wife was unable to have children. Id. at 325. There were additional medical records that would further document Mr. Weaver's sterility, caused by adult-onset measles, but Mr. Weaver was unable to obtain those records during trial. Id. at 326.

Rather than permit Mr. Weaver to present testimony of the likelihood he was unable to impregnate anyone, or give him time to procure necessary witnesses, the court excluded this information from the trial. Id. at 325-27. The court ruled that since the adoption paperwork did not mention that Mr. Weaver was sterile, he must not have been. Id. at 325-26. The court noted that the adoption report said Ms. Weaver had several miscarriages but did not say those were the result of *in vitro* fertilization, and the court would not presume, as Mr. Weaver claimed, that his wife had gotten pregnant through *in vitro* fertilization. Id. The court ignored the current lab results illustrating Mr. Weaver's extreme lack of sperm. 2/22/05RP 319.

The court's refusal to permit Mr. Weaver additional time to present material evidence pertinent to his defense denied him a fair

trial and was an abuse of discretion. The court's unwavering concern with not permitting any trial delays resulted in its unreasonable refusal to permit Mr. Weaver the opportunity to present necessary information. While this information was certainly late in developing, the court did not consider whether this evidence would delay the trial or how long the delay would last. Instead, the court barred the defense from introducing this evidence.

c. The denial of Mr. Weaver's rights to counsel and to present a defense require reversal. A court's unreasonable or erroneous refusal to substitute counsel is presumptively prejudicial and requires reversal. Nguyen, 262 F.3d at 1005; see also Gonzalez-Lopez, 126 S.Ct. at 2565 ("We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (internal citation omitted)).

In assessing whether the deprivation of Mr. Weaver's right to present a defense deprived him of a fair trial, this Court does not make credibility determinations or weigh evidence. Maupin, 128 Wn.2d at 929-30. Instead, this Court takes the proffered evidence as true and evaluates its likely effect on the outcome of the case.

Id. As the error is one of constitutional magnitude, the prosecution must prove beyond a reasonable doubt that the error had no effect on the outcome of the trial. Id.

In the case at bar, Mr. Weaver was denied his right to conflict-free and effective counsel. His attorney admitted he could not advocate for Mr. Weaver, yet the court adhered to its categorical insistence on denying a continuance for any reason. His attorney further admitted he was ill-prepared and listed numerous witnesses to whom he had never spoken. Moreover, when counsel learned in the middle of trial that there was critical information pertaining to Mr. Weaver's inability to impregnate the complainant that would sharply undermine the State's theory of the case, the court unreasonably refused to admit this evidence or grant counsel additional time to offer the necessary witnesses. Given the presumption of prejudice resulting from the deprivation of counsel and of the right to present information pertinent and necessary to the defense, Mr. Weaver was denied his right to counsel and to a fair trial, thus requiring reversal of his convictions.

2. THE STATE FAILED TO MEET ITS BURDEN OF PROVING MR. WEAVER'S OFFENDER SCORE

a. The State had the burden of proving Mr. Weaver's

offenses had not washed out. RCW 9.94A.525(2) provides in relevant part:

Class B prior felony convictions other than sex offenses shall not be included in the offender score if since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years without committing and crime that subsequently results in conviction.

RCW 9.94A.500(1) requires that the sentencing court determine by a preponderance of the evidence the nature and extent of an individual's criminal history.

Due process requires the State bear the burden of proving an individual's criminal history and offender score by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). Where the State fails to offer sufficient evidence such that the record fails to support the criminal history and offender score calculation, the defendant is denied the minimum protections of due process. Id. at 481. Such an error may be raised on appeal even if no objection was raised below. Id.

at 484-85; In re: Personal Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

RCW 9.94A.525(2) mandates that prior offenses, “shall not be included” if they have washed out. The term “shall” indicates a mandatory duty on the trial court. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). The statute is not phrased to imply that prior offenses are included “unless” they are shown to have washed out. Thus, as Ford recognized, the State must offer sufficient proof to permit the trial court to determine the prior offenses should be included in the offender score -- proof that the offenses have not washed out.

b. The State failed to establish Mr. Weaver’s offenses had not washed out. Before a court can include a Class B felony in a person’s offender score the court must determine the person has not spent ten crime-free years from the date of release from confinement to the date of the next offense. RCW 9.94A.525(2). To permit such a determination, the State would have to prove and the trial court must find, at a minimum, the dates of offense, conviction, sentencing, and release from confinement. Moreover, the State would have to prove, and the trial court would have to find, the date of offense for any intervening misdemeanor

convictions which may have prevented the listed offenses from washing out.

Here, the judgment and sentence listed two prior "Burglary 2" offenses with their sentencing dates, "6/12/1985" and "6/10/1981," respectively. CP 30. But there is no determination or finding by the court as to the amount of time served or the date of release from confinement on any of the offenses. Nor is there any finding of the dates that any of the offenses were committed. Absent this information, the State did not establish, and the court could not find that either of the listed offenses had not washed out.

Second degree burglary is a class B felony. RCW 9A.56.030(2). Under the 2006 sentencing guidelines, which may contain higher sentences than in 1984, when this offense was presumably committed according to the cause number, the standard range sentence would be 4-12 months.⁴ For the court to impose a sentence of five years, Mr. Weaver would have needed to have an offender score of nine or more, or to have received an exceptional sentence. It is impossible to believe that he would

⁴ The Washington Sentencing Guidelines Manual is available on the internet, at http://www.sgc.wa.gov/PUBS/Interactive/Sentencing_Form.asp?pid=151208 (last viewed 12/14/06).

have received a sentence of over seven years imprisonment for a single count of second degree burglary. Thus, Mr. Weaver was plainly released from confinement more than 10 years before the December 2002 incident charged in the case at bar.

Moreover, Appendix B of the judgment and sentence purports to list all pertinent criminal history. It reads, "The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525)." CP 81. The following list includes only the two second degree burglaries. If a misdemeanor could prevent wash out, there is no misdemeanor offense listed for the relevant period. Thus, according to the plain language of Appendix B, there is no other criminal history pertinent to calculate Mr. Weaver's offender score. CP 81.

The State did not provide sufficient facts from which the trial court could determine the 1985 and 1981 offenses were properly included in Mr. Weaver's offender score. The State did not prove the dates of commission, conviction, and release for any of the offenses listed in Mr. Weaver's criminal history. Based on the obvious passage of over ten years since the sentencing dates and the relatively short criminal history which indicates the unlikelihood that Mr. Weaver served extraordinarily long sentences for those

offenses, the trial court erred in including these offenses in its calculation of Mr. Weaver's offender score.

RCW 9.94A.500(1) requires the court to determine criminal history. The court neglected this obligation in the case at bar. The information before the court plainly demonstrated that 17 years elapsed between the last conviction and the present incident. CP 81. Based on this information, the court erred by refusing to find these offenses had washed out and could no longer be included in Mr. Weaver's criminal history.

c. Remand for resentencing is required. The determination of criminal history is a required finding at a sentencing hearing. RCW 9.94A.500(1). From that finding a sentencing court then calculates the offender score pursuant to RCW 9.94A.525. The judgment and sentence in this case contains a section entitled "II. FINDINGS." CP 74. Within this section is paragraph 2.4, entitled "Criminal History," which in turn references Appendix B, which contains the court's finding of criminal history. CP 75, 81.

The Supreme Court has said "[i]n the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue."

State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (citing Smith v. King, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); and State v. Cass, 62 Wn.App. 793, 795, 816 P.2d 57 (1991), review denied, 118 Wn.2d 1012 (1992)). Due process requires the State bear the “ultimate burden of ensuring the record” supports the individual’s criminal history and offender score. Ford, 137 Wn.2d at 480-81. As set forth above, the record does not support the inclusion of Mr. Weaver’s two prior offenses in his offender score. Thus, this Court must presume the State did not meet its burden of proof. Armenta, 134 Wn.2d at 1. Thus, the court should strike the offender score calculation and remand for resentencing without inclusion of the unproven prior offenses.

Where the sentencing court incorrectly calculates an offender score, the “remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway.” State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997); State v. McCorkle, 88 Wn.App. 485, 500, 945 P.2d 736 (1997), aff’d, 137 Wn.2d 490 (1999). The prosecution may assert this error is harmless, as the court imposed an exceptional sentence.

However, the court based the length of its sentence on its perception of the standard sentencing range. The prosecution requested and the court imposed a sentence double the high end of the standard sentencing range. 4/8/05RP 375, 382. The court took pains to emphasize that it was imposing a sentence proportional to the sentence that the Legislature would have thought reasonable under the sentencing range, and the prosecutor emphasized the two prior burglary convictions in arguing for the severity of Mr. Weaver's sentence. 4/8/05RP 371, 376, 381.

However, had the court properly calculated Mr. Weaver's offender score, the standard range would have been 78-102 months for each offense, as opposed to 95-125 months. Thus, if Mr. Weaver's standard range was properly calculated at 78-102 months, and not 95-125 months as the prosecution erroneously contended, the court would have imposed a lower sentence.

3. THE COURT LACKED AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE.

In the case at bar, at the time of the incident as well as the time of sentencing, there was no constitutionally valid statutory mechanism for imposing an exceptional sentence. The court relied on its inherent power

to create a mechanism to impose an exceptional sentence. 4/8/05RP 381-82. The sentence imposed violated Mr. Weaver's rights under the Sixth and Fourteenth Amendments, as well as Article I, sections 3, 21, and 22 of the Washington Constitution.

a. The court's sentencing authority derives strictly from statute. Sentencing authority derives strictly from statute, subject to the constitutional rights to due process, a jury trial, and prohibition against cruel and unusual punishment. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536-38, 159 L. Ed. 2d 403 (2004); State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986); U.S. Const. amends. 6⁵, 8⁶, 14⁷; Wash. Const. art. I, section 22.⁸ The legislative branch retains

⁵ The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

⁶ The Eighth Amendment provides, "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted." Washington Constitution, Article I, 14 likewise states, "excessive bail shall not be required, . . . nor cruel punishment inflicted."

⁷ The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

⁸ Article I, section 22 provides:

the power to set the terms of a sentence. As the Washington Supreme Court said in Ammons, “the fixing of legal punishments for criminal offenses is a legislative function.” Id. at 180. In Washington, the Legislature delegated sentencing authority to the court in the Sentencing Reform Act (SRA) within the limits set by the statute. Id. at 181. The constitutional separation of powers doctrine precludes the judiciary and executive branch from asserting sentencing powers not expressly granted by the Legislature. Id. at 180.

In State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192 (2005), the court relied on the principle that the fixing of legal punishments for criminal offenses is a legislative, not a judicial or executive, function in addressing the trial court’s post-Blakely authority to impose an exceptional sentence. (citing Ammons, 105 Wn.2d at 180). The Court of Appeals had ordered that the trial court could empanel a jury to decide the factual issues underlying an exceptional sentence, but the Supreme Court disagreed. The Hughes Court concluded that where “the legislature has not

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 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

created a procedure for juries to find aggravating factors and has, instead, explicitly provided for judges to do so, we refuse to imply such a procedure on remand.” Hughes, 154 Wn.2d at 150.

This result was consistent with the Court’s well-established precedent. In State v. Martin, 94 Wn.2d 1, 514 P.2d 164 (1980), amendments to the Washington Death Penalty Act provided that in the event of a guilty verdict, “the trial judge shall reconvene the same trial jury” to determine whether the death penalty should be imposed. Martin, 91 Wn.2d 1 (citing former RCW 10.94.020(2)). The statute contained no other mechanism for imposition of a death sentence.

Martin attempted to plead guilty at arraignment on the charge of premeditated first-degree murder and in this way avoid the possible imposition of the death penalty. 94 Wn.2d at 3-4. The State sought to bar the plea and, in the alternative, to persuade the Court to imply a special sentencing provision in which the death penalty could be imposed in guilty plea cases, even though the statutory scheme then in effect did not permit such a procedure. 94 Wn.2d at 7-8. The Court held there was no current statutory

which the offense is charged to have been committed and the right to appeal in all cases

provision authorizing the impaneling of a special jury and, furthermore, that it would be "a clear judicial usurpation of legislative power for us to correct that legislative oversight." 94 Wn.2d at 9.

The Court reaffirmed this holding in State v. Frampton, 95 Wn.2d 469, 479, 627 P.2d 922 (1981). Based on Martin and Frampton, the Hughes Court concluded:

the exceptional sentence provisions of the SRA do not provide a mechanism by which a jury could be empanelled on remand to find aggravating factors warranting an enhanced sentence. To the contrary, the statute provides that the court should find facts necessary to support such a sentence. . . This court will not create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure and, instead, explicitly assigned such findings to the trial court. To create such a procedure out of whole cloth would be to usurp the power of the legislature.

Hughes, 154 Wn.2d at 151-52.

Former RCW 9.94A.535 explicitly does not contain a procedure for juries to consider aggravating facts, as required by Blakely. Hughes, 154 Wn.2d at 150; Former RCW 9.94A.535; see also, Laws 2005 ch. 68 § 1 (in preamble to new exceptional sentencing statute, Legislature recognizes the need to craft procedures that will conform the SRA with Blakely). In inventing a

procedure here to enable the State to charge and prove additional facts required for an exceptional sentence, the trial court usurped the Legislature's prerogative to fix punishments for crimes.

In State v. Davis, 133 Wn.App. 415, 426-28, 138 P.3d 132 (2006) (petition for review pending), the court found Hughes applied only to cases on remand by the appellate courts. However, this distinction reads Hughes too narrowly. Hughes expressly rejected the notion that the trial court could create its own sentencing procedures. Hughes stated, "we disagree" that the court may create procedures for imposing an exceptional sentence and disagree

with the reasoning . . . that because there is nothing in the statute to prohibit the procedure and because trial courts have some inherent authority to imply procedures where they are absent, that we could do so here in the face of legislative intent to the contrary. We reach the opposite conclusion.

154 Wn.2d at 152 n.16. Thus, Hughes did not limit its holding to cases on remand, but considered and rejected the notion that the trial court had authority to concoct procedures for imposing an exceptional sentence.

b. The special verdict form did not empower the court to impose an exceptional sentence. In the case at bar, the court

obtained a special verdict finding from the jury that Mr. Weaver impregnated the complainant, and used this finding as a “substantial and compelling reason” to impose a sentence far greater than the standard range. CP 38, 70-73. At the time of Mr. Weaver’s offense, and at the time of sentencing, there was no statutory authority to impose an exceptional sentence based on a jury impaneled to decide aggravating factors. See Former RCW 9.94A.535 (2002); see also RCW 9.94A.535 (2006) (detailing procedures to impanel jury for exceptional sentence).

The trial court does not have powers that the Supreme Court lacks. The Supreme Court’s finding that the appellate court lacks authority to permit new exceptional sentencing procedures applies equally to the trial court’s efforts to concoct ad hoc mechanisms for imposing an exceptional sentence above the standard sentencing range. The unconstitutional exceptional sentence must be reversed and the case remanded for imposition of a standard range sentence. Hughes, 154 Wn.2d at 156.

F. CONCLUSION.

For the foregoing reasons, Mr. Weaver respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this ^{19th}1 day of December 2006.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	COA NO. 57691-7
)	
v.)	
)	
OLIVER WEAVER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

1. THAT ON THE 19TH DAY OF DECEMBER, 2006, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2006 DEC 19 PM 4:27

SIGNED IN SEATTLE, WASHINGTON THIS 19th DAY OF DECEMBER, 2006

x Ann Joyce