

66838-2

66838-2

COA No. 66838-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE WARD,

Appellant.

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

The Honorable Hollis Hill

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
DIVISION ONE
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A. ASSIGNMENTS OF ERROR

1. The sentencing court abused its discretion when the judge entered a no-contact order pursuant to RCW 10.99.050 and as part of the judgment and sentence which prohibited Mr. Ward from having contact with his children without third-party supervision.

2. The sentencing court erred in finding this was a domestic violence offense as defined by RCW 10.99.020.

3. The trial court erred by finding Mr. Ward's children were either victims or witnesses to the unlawful possession of a weapon in the absence of evidence there was a nexus between the children and the offense sufficient to permit the entry of the no-contact order.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The sentencing court's power to enter no-contact orders is defined by statutes, including the Sentencing Reform Act (SRA). The SRA provisions have been interpreted to permit the entry of no-contact orders only as to victims and witnesses. Where the record below failed to establish Mr. Ward's children were either victims of, or witnesses to, his unlawful possession of a firearm, did

the sentencing court exceed its statutory authority in entering the no-contact order?

2. Parents have a fundamental liberty interest in the care, custody, and control of their children. This fundamental right to parent may be restricted as a condition of a criminal sentence if reasonably necessary to prevent harm to the child. Here, Mr. Ward was ordered not to have any contact with his children for a year, except as arranged and supervised by a third party. Did the sentencing court err in so limiting contact between Mr. Ward and his children where not reasonably necessary to prevent harm to the children?

3. The domestic violence provisions of RCW 10.99.020 are intended to apply to offenses in which the offender perpetrates a crime against the person or property of someone with whom they have a domestic relationship. Mr. Ward was convicted of unlawful possession of a firearm, a crime in which the victim is society as a whole. Should the domestic violence designation be stricken as unsupported by the evidence and inapplicable as a matter of law?

C. STATEMENT OF THE CASE

Mr. Ward was charged by information with the unlawful possession of a firearm in the second degree contrary to RCW 9.41.040(2)(a)(i). CP 1. He subsequently entered a plea of guilty to the charge. CP 10-33; 2/22/11RP 3-8.

In entering his guilty plea, Mr. Ward acknowledged that he was convicted of the gross misdemeanor of assault in the fourth degree in 2006. CP 19. He further explained that after completing probation, he had mistakenly believed he was permitted to possess a firearm. CP 19. After his house was burglarized, he obtained a gun to protect himself and his family. CP 20.

Unfortunately, on January 23rd, 2011, Mr. Ward had an argument with his long time girlfriend and the mother of his three children, Jonette Mathias. CP 23. After a phone call, Ms. Mathias's brother John and his wife Veronica, with their daughter, came to pickup Jonette. CP 23. At some point, Veronica

...saw Lawrence walk outside and ... saw a small gun in his right hand. He pulled it out from the back of his pants. He did not point it at us. He walked into the backyard and we heard one shot. We then saw Lawrence walk back to the house via the garage, I did not see the gun.

CP 23.

Mr. Ward described the circumstances similarly.

Me and my Old Lady were arguing verbally. I told her to call her family to get her. Her sister in law, twin brother, and their daughter showed up. They threatened me. I told them to leave and went into the backroom. I came out with the gun but did not show it to them. [They] were already outside by the time I came back out. They were in the driveway in the van getting ready to leave. I asked my old lady who was also outside for the keys to the SUV. Her brother [got] out of the van. He is huge. I went into the backyard and shot the gun into the ground. John had earlier got into my face. I didn't threaten to kill anyone. ...

CP 27.

Jonette, John, Veronica and her daughter then left and called the police. CP 23. When officers arrived, Mr. Ward was detained in the front yard and when asked he told the officers he left the gun on top of the refrigerator. CP 24-26.

The only information regarding Mr. Ward's children was provided by one of the responding officers, Sergeant Boe, who explained that,

After several moments, Officer's [sic] Weekley and Abbott located the children in the rear of the house. They were not hurt. They said they were scared. It was not clear based on what I heard if they were

scared because of the DV or if they were scared because of the police.

CP 26.

At sentencing the prosecutor recommended the court order no contact with Jonette Mathias, her brother and his wife, as well as their daughter. RP 9. In addition, the prosecutor asked the sentencing court to order that Mr. Ward have no contact with his children except as arranged and supervised by a third party. CP 9-10. Mr. Ward objected, through counsel, to the no-contact orders and the restrictions on his contact with his children, as unconstitutional and beyond the scope of the sentencing court's authority. RP 12-14. Mr. Ward further objected to the infringement of his rights as a parent as a result of the no-contact order. RP 12.

The sentencing judge concluded, "based on [her] reading of the certification for probable cause...there is a nexus between this charge and the request for a no contact order." RP 15. Judge Hill then entered a no-contact order which "allow[s] you to see your children but only, um, only, uh, when supervised by a third party." RP 16.¹

¹ The order was reduced to writing in a separate Order Prohibiting Contact that provided, referring to Jonette Mathias, "3rd party contact is

The court entered this order despite Ms. Mathias's imploring Judge Hill that "[Mr. Ward] is a good dad. And I don't want it, a no contact order put on my kids cause he is a good dad and I know he deserves to see his kids." RP 16-17. Nevertheless, Judge Hill reiterated her belief the restriction was appropriate. CP 17-18.

Mr. Ward now seeks review of that order in this Court. CP 40.

D. ARGUMENT

THE ORDER PROHIBITING CONTACT WITH THE CHILDREN WITHOUT THIRD PARTY SUPERVISION EXCEEDS THE COURT'S SENTENCING AUTHORITY UNDER THE SRA AND RCW 10.99, SUBSTANTIALLY IMPAIRING MR. WARD'S PARENTAL RIGHTS WITHOUT DUE PROCESS OF THE LAW.

1. The SRA limits the court's authority to impose no-contact orders to victims and witnesses. A sentencing court can only impose a sentence authorized by the legislature. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). The SRA does permit a sentencing court to "impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." RCW 9.94A.505(8). The Washington

authorized for arranging visitation w/ [defendant's] 3 children." Supp CP __ (Sub no 17) filed February 22, 2011. (Attached as Appendix A for the Court's reference.)

Supreme Court has concluded that trial courts may impose no-contact orders pursuant to this statute as a crime-related prohibition, for a term up to the maximum sentence for a crime. State v. Armendariz 160 Wn.2d 106, 108, 156 P.3d 201(2007); see also RCW 9.94A.700(5)(b) (authorizing as a condition of community custody, no “direct or indirect contact with the victim of the crime or a specified class of individuals”).

RCW 9.94A.030(13) defines a “crime-related prohibition” as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” (emphasis added). Together with RCW 9.94A.505(8), the Supreme Court in Armendariz concluded these provisions authorize trial courts, as part of a sentence, to impose orders prohibiting conduct but they must directly relate to the circumstances of an offender's crime. 160 Wn.2d at 113. Such orders may then reasonably include no-contact with victims or witnesses to the crime like Jonette Mathias, her brother and his wife in this case. CP 23; State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Washington courts have been reluctant to uphold no-contact orders with persons, or classes of persons, different from the victim of the crime. See, e.g., State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998) (no-contact order with minors was not related to crime of rape of adult woman); Ancira, 107 Wn.App. at 656 (no-contact order with children not necessary when defendant convicted of domestic violence against wife). The no-contact order as to Mr. Ward's children in this case was similarly improper.

An appellate court reviews the imposition of crime-related prohibitions such as these no-contact orders for an abuse of discretion. State v. Ancira, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001) (citing State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993)). An abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds or reasons. Ancira, 107 Wn.App. at 653. Where the sentencing court imposed a no-contact order limiting Mr. Ward's contact with his children in the absence of evidence they were either victims or witnesses to Mr. Ward's possession of a firearm, the court abused its discretion.

2. The record failed to establish the children were either victims or witnesses to Mr. Ward's unlawful possession of a firearm.

A "victim," for purposes of the SRA, is one whose injuries are proximately caused by conduct forming the basis of the crime charged. State v. Davis, 53 Wn.App. 306, 310, 766 P.2d 1120 (1989). The record in this case failed to establish any injury to the children that was proximately caused by Mr. Ward's unlawful possession of a firearm.

The only evidence regarding the children was in Sergeant Boe's report, quoted in the affidavit of probable cause, that

the children were in the rear of the house. They were not hurt. They said they were scared. It was not clear based on what I heard if they were scared because of the DV or if they were scared because of the police.

CP 26. This passing second-hand reference to some anxiety the children may have expressed does not make them victims or witnesses within the meaning of the SRA. The uncertainty regarding the source of the children's distress means the evidence was insufficient to establish by any quantum of the evidence that Mr. Ward's conduct was the proximate cause of any injury they may have suffered.

Furthermore, it is important to note that the victim in a violation of the Uniform Firearms Act is not some particular individual, but the public as a whole. The Supreme Court has clearly held that, "In our view, the victim of the offense of unlawful possession of a firearm is the general public. We believe that this offense is analogous to unlawful possession of a controlled substance, a crime which we have held victimizes the general public." State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000). An individual who may have been in the vicinity of an offender at the time he or she possessed a weapon does not then become a "victim" merely by this proximity.²

Mr. Ward's children are far beyond the scope of those individuals whom the legislature had given the authority to order offenders have no contact under the SRA and those provisions should be stricken from his sentence.

² Cases finding a "victim" in a victimless crime for purposes of restitution have still required a direct causal connection between the crime and a specific injury to the victim. See e.g. State v. Coe, 86 Wn.App. 841, 843-45, 939 P.2d 715 (1997), rev den 133 Wn.2d 1031 (1998) (Mildew and dry-rot damage to house, caused by venting of moist air from basement marijuana growing operation into cold upstairs apartment, was foreseeable consequence of criminal activity for which restitution could be required.)

3. RCW 10.99 no-contact orders are limited to crimes committed against family or household members. RCW Chapter 10.99, The Domestic Violence Act, was adopted in 1979 “to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse....” RCW 10.99.100. The Act emphasized the need to enforce criminal statutes in a manner to protect the victim regardless of any relationship with the aggressor. State v. Goodman, 108 Wn.App. 355, 30 P.3d 516, rev den, 145 Wn.2d 1036 (2001).

In doing so, RCW 10.99.050 provides in part:

(1) When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim.

(2)(a) Willful violation of a court order issued under this section is punishable under RCW 26.50.110.

“Domestic violence” is in turn defined by the Act, and

...includes but is not limited to any of the following crimes when committed by one family or household member against another:

- (a) Assault in the first degree (RCW 9A.36.011);
- (b) Assault in the second degree (RCW 9A.36.021);
- (c) Assault in the third degree (RCW 9A.36.031);

- (d) Assault in the fourth degree (RCW 9A.36.041);
- (e) Drive-by shooting (RCW 9A.36.045);
- (f) Reckless endangerment (RCW 9A.36.050);
- (g) Coercion (RCW 9A.36.070);
- (h) Burglary in the first degree (RCW 9A.52.020);
- (i) Burglary in the second degree (RCW 9A.52.030);
- (j) Criminal trespass in the first degree (RCW 9A.52.070);
- (k) Criminal trespass in the second degree (RCW 9A.52.080);
- (l) Malicious mischief in the first degree (RCW 9A.48.070);
- (m) Malicious mischief in the second degree (RCW 9A.48.080);
- (n) Malicious mischief in the third degree (RCW 9A.48.090);
- (o) Kidnapping in the first degree (RCW 9A.40.020);
- (p) Kidnapping in the second degree (RCW 9A.40.030);
- (q) Unlawful imprisonment (RCW 9A.40.040);
- (r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);
- (s) Rape in the first degree (RCW 9A.44.040);
- (t) Rape in the second degree (RCW 9A.44.050);
- (u) Residential burglary (RCW 9A.52.025);
- (v) Stalking (RCW 9A.46.110); and
- (w) Interference with the reporting of domestic violence (RCW 9A.36.150).

While this is not an exclusive list, the Legislature had clearly limited the scope of this chapter, and the criminal penalties which may flow from it, to a specific type of crimes committed by one family or household member against another.

The maxim of statutory construction, *ejusdem generis*, similarly dictates this result.

In the construction of laws, wills, and other instruments, the 'ejusdem generis rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

Black's Law Dictionary 517 (6th ed.1990); see generally City of Seattle v. State, 136 Wn.2d 693, 699, 965 P.2d 619 (1998).

"Domestic violence" for purposes of the Act is limited to a specific type of crime, committed by one family or household member against another, and not the type of victimless crime that was the subject of Mr. Ward's conviction and sentence.

Furthermore, in light of criminal penalties attached to a violation of the order, the rule of lenity would require a restrictive reading of the statute. See e.g. State v. Jacobs, 154 Wn.2d 549,

601, 115 P.3d 281 (2005). Invocation of the provisions of RCW 10.99 was improper and should be stricken because there was no crime committed against a family or household member.

4. The restriction of Mr. Ward's parental rights is unconstitutionally overbroad in the absence of a showing of necessity consistent with RCW 13.34.³ A parent has a fundamental liberty interest in the care, custody, and control of his child. Santosky v. Kramer, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982); In re Dependency of J.B.S., 123 Wn.2d 1, 12, 863 P.2d 1344 (1993); In re Welfare of A.J.R., 78 Wn.App. 222, 229, 896 P.2d 1298, rev. denied, 127 Wn.2d 1025 (1995); U.S. Const, Amend 14; WA Const Art 1, sec 3. While this fundamental right is not absolute, the State's power to intervene is limited to circumstances where it is necessary to protect the children and the parent's "actions or decisions seriously conflict with the physical or mental health of the child." In re Welfare of Sumey, 94 Wn.2d 757,

³ Juvenile dependency matters are governed by RCW 13.34. In enacting RCW 13.34, the Legislature acknowledged the importance of the family unit: the family unit is a fundamental resource of American life which should be nurtured . . . the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized.
RCW 13.34.020.

762, 621 P.2d 108 (1980) (citations omitted); Ancira, 107 Wn.App. at 654.

Because the no-contact orders regarding his children restrict Mr. Ward's fundamental constitutional right to raise and care for them, they warrant the most careful review. State v. Warren, 165 Wn.2d at 32 (citing State v. Riles, 135 Wn.2d at 347). In fact, the Supreme Court has noted that conditions such as these which interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order, and "must be sensitively imposed." Id., (citing United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975)).

While recognizing the importance of parental rights, this Court in Ancira concluded:

The fundamental right to parent can be restricted by a condition of a criminal sentence if the condition is reasonably necessary to prevent harm to the children.

Ancira, 107 Wn.App. at 654 (emphasis added). In Ancira, the defendant violated the terms of a no-contact order with his wife, the mother of his children, and subsequently left with one of the children for several days. Id. at 652. As part of his sentence, the

court ordered that Mr. Ancira have no contact with his wife and children for five years. Id. at 652-53.

This Court found the restriction, prohibiting contact between Mr. Ancira and his children, was not reasonably necessary to prevent the children from witnessing domestic violence between their parents. Id. at 654.⁴ This Court found the no-contact order “extreme and unreasonable given the fundamental rights involved.” Id.

Even where some restrictions might be appropriate, this Court noted that “the criminal sentencing court is not the proper forum to address these legitimate concerns other than on a transitory basis.” Id. Instead, family and juvenile courts are better equipped to address these issues because they routinely investigate the best interests of the children and have the broad discretion necessary to tailor such orders in ways criminal courts cannot. Id. (citing State v. Letourneau, 100 Wn.App. 424, 443, 997 P.2d 436 (2000)).

⁴ The Court further found the total prohibition of even indirect contact with the children, via telephone, mail, or e-mail, did not support the lower court’s goal of preventing the children from witnessing domestic violence. Id. at 655.

Finally, the Court also rejected an argument that the children, as witnesses to a crime, were properly included in the no-contact order. Id. at 656. While the Court acknowledged the statutory authorization for such orders, it noted that notwithstanding the fact that Mr. Ancira's children were "directly connected" to the circumstances of the crime, "this does not ameliorate the constitutional problems" associated with interfering in the familial relationship. Id. As such, the Ancira Court struck that portion of Mr. Ancira's sentence prohibiting contact with his children for a period of five years and remanded the case for further proceedings. Id. at 657. The same result is required in Mr. Ward's case.

5. The no-contact order improperly interfered with Mr. Ward's parental relationship in the absence of due process protections and must be stricken. Here, Mr. Ward's liberty interest in his children and his due process rights were severely impaired by the court's imposition of the order prohibiting contact with his three children for five years unless supervised by a third party.

Judge Hill's order in this case substantially limits Mr. Ward's ability to parent his children, bypassing compliance with the due process protections set forth in the dependency statutes of RCW

13.34 as the order specifically threatens criminal sanctions if Mr. Ward fails to comply.

As in Ancira, the no-contact order entered in Mr. Ward's case was overly broad and, in the absence of evidence establishing the children were either witnesses or victims of the offense, improperly infringed on his fundamental right to parent. Moreover, this was done in the absence of the due process protections normally afforded under RCW 13.34. Due to the severity of the condition and the lack of constitutional protections, Mr. Ward asks this Court to vacate that portion of his sentence restricting his contact with his children.

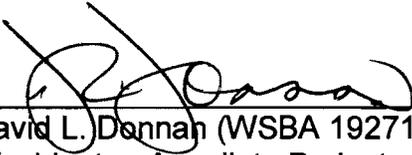
Where a term included in a sentencing order is found to be improper, "[t]he simple remedy is to delete the questionable provision from the order." State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 65(1998). Here, the sentencing court imposed an unnecessarily severe restraint on Mr. Ward's parental relationship with his children, which bears no relation "to the essential needs of the state and public order." Riles, 135 Wn.2d at 350. This unconstitutional restraint must be stricken. Ancira, 107 Wn.App. at 656-57.

The trial court must apply the correct law and when it does not do so, the court's discretion has been abused. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 377 (2000); see State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); Ryan v. State, 112 Wn. App. 896, 899, 51 P.3d 175 (2002) (discretion is abused where a court bases its decision on an incorrect understanding of the law) (citing Junker, 79 Wn.2d at 12).

E. CONCLUSION

Mr. Ward requests this Court reverse provisions of his sentence ordering he have no contact with his children in the absence of third party adult supervision because they were neither "victims" nor "witnesses" to his possession of a firearm. Even if they were, this is an unconstitutional burden on his right to parent that was entered without the statutorily prescribed process he was due.

Respectfully submitted this 11th day of August 2011.


David L. Donnan (WSBA 19271)
Washington Appellate Project - 91052
Attorneys for Appellant

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KENT, WA

FEB 22 2011

CERTIFIED COPY TO WARRANTS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 11-1-01208-1 KNT

vs.

ORDER PROHIBITING CONTACT
CONDITIONS OF SENTENCE
(DOMESTIC VIOLENCE)

Lawrence Ward

Defendant,

THIS MATTER having come on before the undersigned judge, and the court having considered the records and files herein, HEREBY ORDERS, that pursuant to RCW 10.99.050, and as a condition of sentence in this matter, that the defendant shall have no contact, directly or indirectly, in person, in writing or by telephone, personally or through any other person, with

- 1) ~~Jonathan Mathias (9.9.78) until 2011~~
- 2) ~~John Mathias (9.9.78) until 2011~~
- 3) ~~Vernice Mathias (12.2.78) until 2011~~

and shall not knowingly enter, remain or come within 500 ft (distance) or the protected person's residence school workplace other person until 2/22, 2011

VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 2650 RCW AND WILL SUBJECT A VIOLATOR TO ARREST; ANY ASSAULT, DRIVE-BY SHOOTING OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS ORDER IS A FELONY. You can be arrested and prosecuted even if any person protected by this order invites or allows you to violate this order's prohibitions. You have the sole responsibility to avoid violating this order's provisions. Only the court can change this order. This order is valid and entitled to enforcement in this and all other jurisdictions.

IT IS FURTHER ORDERED, that any order prohibiting contact previously issued under the above cause is recalled and superseded by this order.

Dated this 22nd day of February, 2011.

Presented by: [Signature]
Deputy Prosecuting Attorney, WSBA# 7228

[Signature]
JUDGE

Lawrence Ward DATE: 2/22/11
(Signature of Defendant, Copy Received)

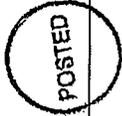
~~Logan Ward~~
John Mathias 7/1/78
Vernice Mathias 12/2/78
Donna Jo Kalahui 12/2/78

* 3rd party contact
is authorized for arranging
supervised visitations w/ 3
children

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ORDER PROHIBITING CONTACT
CONDITIONS OF SENTENCE (DOMESTIC VIOLENCE) 1/08

APPENDIX A



17

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66838-2-I
v.)	
)	
LAWRENCE WARD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] LAWRENCE WARD 1513 136 TH ST BURIEN, WA 98186	(X) () ()	U.S. MAIL HAND DELIVERY _____

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 AUG 12 PM 4: 58

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF AUGUST, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710