69118-0

69118-0

NO. 69118-0-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Appellant

v.

JOHN A. JONES, III

Respondent

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES 2

III. STATEMENT OF THE CASE 3

IV. ARGUMENT 8

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO PERMIT THE STATE TO SUPPLEMENT THE RECORD TO PROVE COMPARABILITY. 8

B. A CERTIFIED COPY OF THE TRANSCRIPT WAS NOT REQUIRED UNDER THE RULES OF EVIDENCE. 15

V. CONCLUSION 21

TABLE OF AUTHORITIES

WASHINGTON CASES

Fircrest v. Jensen, 158 Wn.2d 384, 143 P.3d 776 (2006), cert. denied, 549 U.S. 1254 (2007) 19
In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005) 10
In re Connick, 144 Wn.2d 442, 28 P.3d 729 (2001) 16, 17, 18
In re Littlefield, 133 Wn.2d 39, 940 P.2d 1362 (1997) 9
State v. Cabrera, 73 Wn. App. 165, 868 P.2d 179 (1994) 17
State v. Ford, 137 Wn.2d 472, 973 P.2d 542 (1999) 9, 16
State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2102) 19
State v. Herzog, 69 Wn. App. 521, 849 P.2d 1235, review denied, 122 Wn.2d 1021 (1993) 9
State v. Hunley, 161 Wn App. 919, 253 P.3d 448, review granted, 172 Wn.2d 1014 (2011) 11, 12, 13
State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994) 13
State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002) 10, 12
State v. McCorkle, 88 Wn. App. 485, 945 P.2d 736 (1997), affirmed, 137 Wn.2d 490 (1999) 10
State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009) 11, 12, 13
State v. Morley, 134 Wn.2d 588, 952 P.2d 168 (1998) 17
State v. Nelson, 103 Wn.2d 760, 697 P.2d 579 (1985) 20
State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997) 15
State v. Strauss, 119 Wn.2d 401, 832 P.2d 78 (1992) 20
State v. Wilson, 113 Wn. App. 122, 52 P.3d 545 (2002), review denied, 149 Wn.2d 1006, 67 P.3d 1097 (2003) 15, 16, 17, 19, 20

WASHINGTON STATUTES

Laws of Washington 2008, Ch. 231, §1 10
Laws of Washington 2008, Ch. 231, §4 10
RCW 5.44 .... 17, 19
RCW 5.44.010 19
RCW 5.44.040 19
RCW 9.94A.500 .... 10, 12
RCW 9.94A.525 10
RCW 9.94A.530 .... 10, 12, 13
RCW 9.94A.530(2) 12, 13
RCW 9A.28.020(1) 14
RCW 9A.32.030(1)(a) 14
RCW 9A.32.050(1)(b) 14

COURT RULES

CR 44 17
CR 44(c) 17
ER 101 18
ER 901 .... 17, 18
ER 902(d) 18
ER 920 17
ER 1101 18
ER 1101(c)(3) 18

I. ASSIGNMENTS OF ERROR

The defendant was before the court for re-sentencing after this Court reversed his sentence on the basis that the State had not established the factual comparability of the defendant California convictions for murder and attempted murder. The State subsequently obtained a copy of the transcript of a preliminary hearing that the defendant admitted formed a factual basis for the crime in his plea to those offenses.

1. The trial court abused its discretion when it denied the State's motion for a short continuance of the re-sentencing hearing to obtain a certified copy of the transcript of the California preliminary hearing.

2. The trial court erred in refusing to consider the transcript of the preliminary hearing when determining the defendant's offender score at the re-sentencing hearing.

3. The trial court miscalculated the defendant's offender score when it did not include the defendant convictions for murder and attempted murder from California in that score.

4. The trial court's determination of the defendant's standard range sentence for Assault Second degree was erroneous.

5. The trial court erred when it failed to consider the defendant's prior convictions for murder and attempted murder when setting the term of an exceptional sentence, where the court stated that it had previously considered those convictions as a basis for determining an appropriate exceptional sentence.

II. ISSUES

1. The defendant had pled guilty to Murder and Attempted Murder in California. In his plea statement he admitted to the facts to support the charges as presented in a preliminary hearing. The defendant was then convicted of Assault in Washington. This Court reversed the defendant's sentence for the assault on the basis that the State had failed to prove the California convictions were comparable to a Washington offense. At resentencing the State produced a copy of the transcript of the California preliminary hearing to prove the charges were comparable to Washington offenses.

a. Did the trial court err when it precluded the State from supplementing the record with a transcript of the preliminary hearing to establish factual comparability of the California convictions with Washington offenses?

b. Was it an abuse of discretion to deny the State's motion for a short continuance to present a certified copy of that document when the prosecutor represented a certified copy had been ordered and was expected within a few days?

2. Did the trial court abuse its discretion when it did not consider the out of state convictions for murder and attempted murder on the basis that the State was not allowed to supplement the record in order to prove the prior offenses should be included in the defendant's offender score?

III. STATEMENT OF THE CASE

The defendant was tried on a second amended information charging him with one count of fourth degree assault, one count of third degree assault, three counts of second degree assault, and three counts of Harassment (DV). 1 CP 442-444. The jury convicted the defendant of one count of second degree assault alleged in count V of the information. By special verdict it found the assault occurred within the sight or sound of the victim's or the defendant's minor child or children under the age of 18. It acquitted the defendant of all other charges. 1 CP 384-401.

At sentencing the State produced some evidence to prove the defendant's prior criminal history which included a certified copy

of an information charging the defendant with one count of Murder with a firearm, two counts of attempted murder with a firearm, and one count of assault with a firearm and documents showing that he pled guilty to those charges. 4 CP __ (sub 68), 4 CP __ (sub 102). The court determined the defendant's offender score was 6 by counting the murder and attempted murder convictions. 1 CP 371-72. The court did not count two other convictions for the assault or for a conviction of possession of controlled substance. Id. Based on the aggravating factor found in the special verdict the court sentenced the defendant to an exceptional sentence of 120 months confinement. 2 CP 376.

The defendant appealed his conviction and sentence. This Court affirmed the conviction but remanded for resentencing. The Court reasoned that the trial court had failed to conduct a comparability analysis for the California convictions, and therefore failed to properly calculate the offender score. The Court did not consider whether the State should be allowed to introduce additional evidence at the resentencing hearing, finding the issue was not ripe for review. 2 CP 362-364.

At the resentencing hearing held December 13, 2010 the State argued the California murder and attempted murder

convictions were comparable to those crimes in Washington. The State supplemented the record with documentation from the murder and attempted murder case and additional documentation establishing the possession of controlled substance case. The State argued based on this information the court should find those prior convictions were comparable to Washington offenses and should count toward his offender score of 7. 2 CP 209-308.

The defendant objected to the State supplementing the record with additional documents proving the comparability of his out of state convictions. 2 CP 317. The defendant further argued that the State had failed to prove the California murder conviction and attempted murder conviction was legally or factually comparable to those crimes in Washington. 1 CP 168-169; 2 CP 309-315.

The trial court allowed the State to supplement the record. It then determined the defendant's offender score was 7. It re-imposed the exceptional sentence of 120 months confinement. 1 CP 174-175; 2 CP 202-204.

The defendant again appealed his sentence. This Court again remanded for resentencing finding the information provided to the court was insufficient to prove the California convictions for

murder and attempted murder were legally or factual comparability to those crimes in Washington. 1 CP 187. The State conceded that the statutes were not legally comparable. This Court found the defendant admitted to the facts in the p.x. transcript during his plea colloquy, but that transcript was not in the record. The State had therefore failed to establish factual comparability. 1 CP 192-193. The case was remanded for resentencing consistent with the court's opinion. 1 CP 194. In this second appeal the defendant did not argue, and this Court did not decide, whether the State could further supplement the record at the second resentencing hearing.

On remand the court held a second re-sentencing hearing on June 29, 2012. The State offered the transcript from the preliminary hearing that the defendant stipulated to when he pled guilty to the murder and attempted murder charges. The transcript was not certified. The State argued that the court should consider it because the rules of evidence did not apply at sentencing hearings and there was no challenge to the authenticity of the transcript. Alternatively, if the court thought it needed a certified transcript the State asked for a short continuance. The prosecutor represented that one had been requested from the California jurisdiction where

the conviction entered and would be received in three or four days. RP 2.

The defense objected to the State supplementing the record with the any transcript of the preliminary hearing. 1 CP 149-50, 152; RP 3.

The Court stated:

> I continue to fundamentally disagree with Ms. Kyle's assertion that this was just a case of a broken nose. I found it was a brutal assault, and I felt that Mr. Jones, then, if not now, remained a brutal person...
>
> I believe the circumstances of the assault, coupled with his criminal history, continued to warrant a 10-year prison term. If he had no history of violence or murder and attempted murder, I would not have imposed a term of 10 years. The defense wants me to ignore those prior convictions and consider, if anything, only the prior drug conviction and to look at this as simply a run of the mill physical assault, and I generally disregard that. I don't agree with that analysis.

RP 7-8.

Nevertheless the Court denied the State's request to supplement the record. The court also denied the request to continue the hearing to provide a certified copy of the transcript of the preliminary hearing establishing the facts of the murder and attempted murder charges. RP 9-10.

The court then found the defendant had an offender score of 1 for the prior possession of controlled substances charge. The judge noted that he had previously imposed a 120 month sentence based on the seriousness of the circumstances of the assault and the prior violent criminal history. Despite its earlier comments the court did not take into consideration the criminal history after excluding it from the offender score calculation, and instead focused on the nature of the assault. It then imposed an exceptional sentence of 60 months. RP 10-11; 1 CP 130-132.

On July 2, 2012 the State filed with the Court a certified copy of the transcript of the preliminary hearing. 1 CP 1-128.

IV. ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO PERMIT THE STATE TO SUPPLEMENT THE RECORD TO PROVE COMPARABILITY.

The trial court acknowledged that State had provided a transcript of the preliminary hearing relied on by the defendant to support a factual basis for his plea to murder and attempted murder. RP 5. The court had apparently indicated at some point before the sentencing hearing that it would require the transcript to be certified. The prosecutor argued it need not be certified, but in any event a certified copy had been requested and would be

available in a few days. RP 2. Nevertheless the court denied the State's request for a continuance because it believed that the State would not be permitted to provide additional materials to establish comparability. The court's decision was an abuse of discretion.

Whether to grant or deny a motion to continue a sentencing hearing is within the discretion of the trial court. State v. Herzog, 69 Wn. App. 521, 524, 849 P.2d 1235, review denied, 122 Wn.2d 1021 (1993). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standards." Id.

Prior to 2008 the State was permitted to supplement the record on remand for resentencing after a successful challenge to the offender score only if the defendant had not raised a specific objection to the offender score at the original sentencing hearing. State v. Ford, 137 Wn.2d 472, 485-86, 973 P.2d 542 (1999), State

v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997), affirmed, 137 Wn.2d 490 (1999), In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002). In 2008 the Legislature amended the Sentencing Reform Act in response to these decisions. The Legislature found the amendments to RCW 9.94A.500, RCW 9.94A.525, and RCW 9.94A.530 were necessary "in order to ensure that sentences imposed accurately reflect the offender's actual, complete, criminal history, whether imposed at sentencing or upon resentencing." Laws of Washington 2008, Ch. 231, §1. Thus RCW 9.94A.530 was amended in part to read "[o]n remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history not previously presented." Laws of Washington 2008, Ch. 231, §4.

Thus the Legislature made it clear that it was most interested in accurate sentences. Regardless of whether the defendant objected to the evidence provided at sentencing or not, if on appeal or collateral attack the Court concluded an error in calculating the offender score had been committed, the State would be given an opportunity to supplement the record.

Despite the Legislative amendments, the court denied the motion to continue and the motion to supplement the record. The trial court reasoned that the State was held to the record of the prior sentencing hearing on remand for resentencing relying on State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009) and State v. Hunley, 161 Wn App. 919, 253 P.3d 448, review granted, 172 Wn.2d 1014 (2011). RP 9. In each of those cases the court sentenced the defendant based on the prosecutor statement outlining the defendant's criminal history which was not supported by any documentation. The defendant in each case neither acknowledged nor objected to that statement of criminal history. Under those circumstances the Court remanded for resentencing with the opportunity for the State to supplement the record. Mendoza, 165 Wn.2d 930, Hunley, 161 Wn. App. at 930.

Neither Mendoza nor Hunley involved circumstances similar to this case where the State had provided evidence in support of finding the prior convictions should count in the defendant's offender score, but the Court found the evidence insufficient. They therefore do not directly address the issue here.

To the extent that Mendoza applies here, it supports the conclusion that the State should have been able to supplement the

record. In Mendoza the Court considered sentences imposed before the 2008 amendments to RCW 9.94A.530 in two cases. Although the Court permitted the State to supplement the record, citing its previous decision in Lopez, it also noted that the parties agreed that the 2008 version of RCW 9.94A.500 and RCW 9.94A.530 would apply at resentencing. Id. at 930, n. 9. That version of RCW 9.94A.530 categorically permits the State to supplement the record with materials not previously considered by the court.

Hunley also supports the conclusion that the State should have been permitted to supplement the record with the transcript. There the court reversed the sentence after finding a portion of the legislative amendments to RCW 9.94A.530(2) not at issue here was unconstitutional. It permitted the State to supplement the record at re-sentencing in part because it was "consistent with RCW 9.94A.530(2), which provides, 'On remand for resentencing...the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.'" Hunley, 161 Wn. App. at 453-54 (emphasis added).

Thus, contrary to the trial court's reading of Mendoza and Hunley, those cases stand for the proposition that the legislative amendment to RCW 9.94A.530(2) does permit additional materials to be considered by the court at resentencing, even when the defendant has previously challenged his criminal history.

In addition the language of the statute mandated that the court permit the State to supplement the record. When the legislature uses the word "shall" it is mandatory, not discretionary. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). The legislature specifically provided that on remand after an appeal or collateral attack "the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history..." RCW 9.94A.530(2). The court did not have the discretion to deny the State the opportunity to supplement the record.

The court's reason for denying the motion to supplement the record is based on an incorrect legal standard, and therefore was an abuse of discretion. The court denied the motion to continue on the incorrect belief that the State was not permitted to produce supplemental materials to be considered by the court in resentencing. Thus the court abused its discretion when it denied

the motion to continue the sentencing date for a short period of time.

Had the court permitted the State to supplement the record there would have been a basis to find the defendant's prior California convictions for murder and attempted murder were comparable to Washington crimes. The facts testified to at the PX hearing show that the defendant participated in a drive by shooting where one person was killed and two other people were struck by gun fire. The defendant had been assaulted by one of the persons injured the day before. He admitted that the next day he saw two people who looked like the people who beat him up. He got a co-defendant to obtain a weapon. His intent was to "get those fools." They went back to where the group of people stood. There his co-defendant fired five shots at the group. 1 CP 4-12, 15-16, 51-53, 56-57, 65-68, 79-87. That conduct would support convictions for two counts of Attempted Murder First Degree and Murder First Degree, RCW 9A.32.030(1)(a) and RCW 9A.28.020(1) or Murder Second Degree, RCW 9A.32.050(1)(b).

The trial court's error thus resulted in miscalculating the defendant's offender score. When the court miscalculates the offender score before imposing an exceptional sentence remand for

resentencing is necessary unless it is clear from the record that the sentencing court would have imposed the same sentence anyway. State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). Here the court clearly would not have imposed the same sentence had it correctly calculated the offender score. The court stated that it relied in part on the defendant's history of violent crime to impose the original 120 month exceptional sentence. Without considering that history the court relied only on the nature of the offense to impose a 60 months exceptional sentence. RP 10-11.

B. A CERTIFIED COPY OF THE TRANSCRIPT WAS NOT REQUIRED UNDER THE RULES OF EVIDENCE.

The trial court also refused to consider the copy of the preliminary hearing transcript at the time of re-sentencing because the State had only produced an uncertified copy. The Court relied on State v. Wilson, 113 Wn. App. 122, 52 P.3d 545 (2002), review denied, 149 Wn.2d 1006, 67 P.3d 1097 (2003). RP 9.

In Wilson Division 3 of the Court of Appeals considered whether evidence produced by the State was sufficient to prove the existence and comparability of out of state convictions. There the State sought to include two prior California convictions for drug offenses. To prove those convictions the State submitted a faxed

copy of the Los Angeles County felony complaint charging the defendant under a different name than he had been charged in the Spokane Information, an unauthenticated copy of the plea hearing transcript that was not signed by the court reporter, an unauthenticated copy of court minutes detailing the disposition of the case including the court's acceptance of a guilty plea, and court documents from a Spokane County conviction in which Wilson signed off on his criminal history which included the two California convictions. Wilson, 113 Wn. App. at 137-38. The court held uncertified copies of the California documents did not satisfy the State's burden of proof, relying on In re Connick, 144 Wn.2d 442, 28 P.3d 729 (2001), and Ford, supra. Wilson, 113 Wn. App. at 139. Neither case supplies the authority for the Court's conclusion that certified copies of all documents were required to sustain the State burden to prove comparability of out of state convictions at sentencing.

Ford said that "the best evidence of a prior conviction is a certified copy of the judgment. However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history." Ford, 137 Wn.2d at 480. (citations omitted). Ford did not state that other records such

as transcripts of prior proceedings must be certified. Ford did rely on State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994) and State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 168 (1998). While Cabrera does not shed any light on whether the sources other than the judgment must be certified in this context, Morley does. There the State produced the entire record of the defendant's military court martial, including a stipulation of facts signed by the defendant and a transcript of the court martial hearing where the judge accepted the defendant's guilty plea. Neither document appears to have been certified. Nevertheless the Court considered those documents when it concluded the defendant's prior offense was factually comparable to a Washington offense. Morley, 134 Wn.2d 588-89.

Wilson cited Connick for the proposition that documents that do not satisfy the authentication test under ER 901 and ER 920, chapter 5.44 RCW or CR 44[1] may not be relied on to establish a fact in dispute absent a stipulation or order of a court to accept the documents for what they purport to be. Wilson, 113 Wn. App. at 136. Connick was a personal restraint petition wherein both the

[1] CR 44 does not prevent proof of official records by any other method authorized by law. CR 44(c). Because the Rule of Evidence do not apply at sentencing hearings CR 44 does not support the Court's decision in Wilson.

petitioner and the State submitted uncertified copies of documents in support of their respective positions. The Court chastised the parties failure to submit authenticated or certified copies stating "[i]t is beyond question that all parties appearing before the courts of this State are required to follow the statutes and rules relating to authentication of documents." Connick, 144 Wn.2d at 458.

The Rules of Evidence apply in a court of this state subject to the exceptions set out in ER 1101. ER 101. The rules relating to authentication of documents are set out in Title 9 of the Rules of Evidence. A certified copy of a public document is self-authenticating, and therefore is admissible into evidence, where the rules of evidence apply. ER 901, ER 902(d). The Rules of Evidence do not apply in certain proceedings. They do not apply at sentencing hearings. ER 1101(c)(3). Personal restraint petitions are not specifically exempted from application of the Rules of Evidence. While the Court rightly admonished the parties to comply with those rules in the context of a personal restraint petition the statement in Connick does not supply authority for the proposition that the State must produce certified copies of transcripts when proving comparability of out of state convictions in sentencing proceedings.

Nor does RCW 5.44 compel the conclusion that documents submitted at sentencing hearing must be certified. Certified documents of records and proceeding are admissible in evidence in all courts of this state. RCW 5.44.010, RCW 5.44.040. Those statutes do not state uncertified copies are not admissible in any proceeding.

The rules relating to admission of evidence are procedural and therefore within the province of the court to prescribe. Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006), cert. denied, 549 U.S. 1254 (2007). The Legislature may enact evidence rules as long as they do not irreconcilably conflict with an evidence rule promulgated by the court. Id. In that case the court will attempt to harmonize the rule and the statute. Id. If the rule and statute irreconcilably conflict the statute violates the separation of powers doctrine, and is therefore unconstitutional and invalid. State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2102). RCW 5.44 is valid because it does not require certification as a condition precedent to admission of public records in all circumstances.

Thus the authority relied on in Wilson neither specifically nor by implication stated that other documents used to establish the defendant's criminal history at sentencing must be certified. The

Court in Wilson erred when it concluded that statutes and rules required that any evidence supporting comparability of out of state conviction be certified or authenticated.

Additionally, under the circumstances, Due Process considerations did not dictate the evidence produced in support of the comparability analysis was a certified copy of the transcript. Due Process requires that a defendant in a sentencing hearing be given an opportunity to refute the evidence presented and that the evidence be reliable. State v. Strauss, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992). One way evidence is reliable if it is corroborated by the defendant's guilty plea. Id. at 419. If a defendant does not challenge the evidence the court may also consider it without violating Due Process considerations. State v. Nelson, 103 Wn.2d 760, 697 P.2d 579 (1985). Here there was no challenge to the reliability or authenticity of the preliminary hearing transcript. The defendant's guilty plea to the murder and attempted murder charges that were the subject of that hearing corroborate the transcript. Thus the defendant's Due Process rights would have been preserved if the trial court had allowed the State to rely on the uncertified copy of the transcript.

Neither case authority, the evidence rules, nor constitutional considerations required the State to produce a certified copy of the preliminary hearing transcript to prove the defendant's prior California convictions for murder and attempted murder were comparable to Washington crimes. The trial court erred when it required a certified copy of that document.

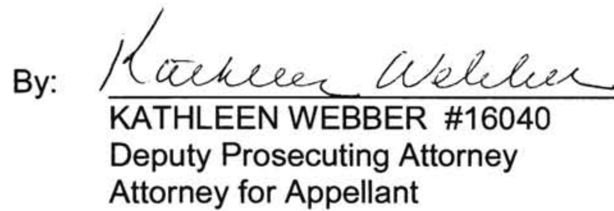
V. CONCLUSION

The trial court erred when it refused to permit the State the opportunity to prove the defendant's California convictions for murder and attempted murder were comparable to those crimes in Washington. In committing that error the court miscalculated the defendant's offender score. Because the record does not clearly indicate that the court would have imposed the same sentence had it correctly calculated the offender score the State asks the Court to remand to the trial court with direction to consider the supplemental

information, recalculate the offender score and resentence the defendant.

Respectfully submitted on October 26, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Appellant, v. JOHN A. JONES, III, Respondent.	No. 69118-0-I AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:
The undersigned certifies that on the 26th day of October, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
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600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

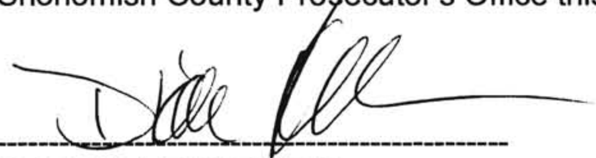
WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Respondent of the following documents in the above-referenced cause:

BRIEF OF APPELLANT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 20th day of October, 2012.



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