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No.72932-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE: THE MARRIAGE OF

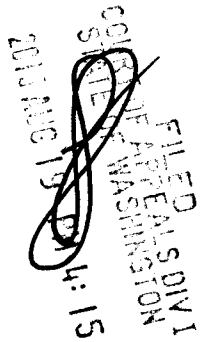
JARED BRYAN KILLEY

Appellant

V

ELIZABETH KILLEY/RODRIQUEZ

Respondent



ON APPEAL FROM SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

No. 13-3-13106-8 SEA and No. 14-2-01611-5 SEA

Before the Honorable Judge Samuel S. Chung

APPELLANT'S REPLY BRIEF

Jared Bryan Killey

Appellant Pro Se

6818-208th SW #5563

Lynnwood, WA 98046

(206) 468-7017

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A. INTRODUCTION

Jared Killey is the Appellant in this case in which he is seeking reversal of a Parenting Plan established for his son, (A.S.K.), on the basis that the Parenting Plan is manifestly unreasonable because it does not provide for the best interests of his child and because restrictions imposed in the Parenting Plan are not supported by law and are inconsistent with the Court's mandate under (RCW 26.09.002) to use 'the best interests of the child'' standard to provide for the welfare of children in a dissolution action. The Trial Court abused its discretion.

The Trial Court erred in placing draconian restrictions on the Father's residential time with his child without making an express finding to support the legal basis for imposing restrictions.

B ARGUMENT

1. The Trial Court's Legal Basis for Restrictions in the Parenting Plan Requires Clarification.

In *Re Marriage of Katare 125 Wn.App. 813 817* the Court of Appeals remanded the Katare case back to the Trial Court for clarification of the legal basis for travel restrictions in the Parenting plan, not once, but twice. *'Rather than speculate, we remand for the Trial Court to clarify the legal basis for its decision'.*

Here, the Trial Court did not make an express finding of the legal basis for restrictions on Mr. Killey's residential time with A.S.K.

Mr. Killey proved by a 'preponderance of the evidence' that he did not have a 'history of acts of domestic violence' and has no criminal record. Mr. Killey proved by a 'preponderance of the evidence' at two trials that he did not engage in multiple acts of assault as defined in RCW 26.50.010 which is required to place restrictions on his residential time with A.S.K. under RCW 26.09.191 (2).

Without knowing the specific legal basis for restrictions and how those restrictions provide for the best interests of A.S.K., this Court cannot determine whether the Trial Court's limitations are consistent with RCW 26.09.191 (2)(a)(iii) and (2)(n) or if limitations were imposed using the correct legal standard which is 'the best interests of the child'.

If the Trial Court imposed restrictions for the purpose of sanctioning Mr. Killey for alleged misbehavior during the marriage, or if it imposed restrictions to coerce Mr. Killey to purchases services from the Court, or if it imposed restrictions to indemnify Ms. Rodriquez for her personal injury claims from 2010, or for any reason other than A.S.K.'s welfare, then it imposed restrictions for an improper purpose and is an abuse of discretion, requiring that the ruling be reversed.

This Court should remand to King County Superior Court for clarification of the legal basis for restrictions imposed in the Parenting Plan.

2. Mr. Killey proved by a preponderance of the evidence that he did not commit an assault as defined in RCW 26.50.010

a) Jared has no burden to prove his innocence. It is presumed. Ms. Rodriquez made an allegation; the State wishes to penalize Mr. Killey

b) The burden of proof falls on Ms. Rodriquez and The State.

c) The Trial Court used an improper process to determine the truth of the facts alleged and made an erroneous conclusion of Law.

When making a finding under RCW 26.09.191(2) the Trial Court must adhere to the rules in RCW 26.09.191 (6) which reads: *'In determining whether any of the conduct described in this section (RCW 26.09.191(2) has occurred, the Court shall apply the civil rules of evidence, proof and procedure')*

The Trial Court's procedure did not follow the rules.

Under RCW 4.16.100 (1) a claim for assault in a civil action is limited to two years but Ms. Rodriquez did not bring this action for four (4) years. This matter was not properly before the Court for consideration.

Ms. Rodriquez is barred from making a complaint four years after the fact and the Court is barred from granting her relief via an Order for Protection or via the Parenting Plan.

Additionally, Court Rule 43 requires sworn testimony under oath to be taken in open Court, not in a Social Worker's office. Hunter is not qualified to take depositions or to administer oaths. Her role is one of social work, not judge and juror to decide guilt and then tell the Court how it should rule, as happened here.

CR 43 (a) 1 Generally. In all trials the testimony of witnesses shall be taken orally in open Court, unless otherwise directed by the Court or provided by rule or Statute.
(d) Oaths of Witnesses.
(1) Administration. The oaths of all witnesses in the Superior Court
(A) shall be administered by the judge;

Testimony regarding the details of the alleged assaults was not litigated in open Court under oath, but were decided in Debra Hunter's office before trial, and unsworn testimony was passed to the Court as fact in a written report. Mr. Killey testified the report contained false information. RP 122 Mr. Killey repeatedly objected to testimony by Hunter as false, gossip, rumors, unsubstantiated and that Hunter was testifying to things she could not possibly know. RP 112-140

A domestic violence assessment cannot replace sworn testimony. It violates the civil rules of evidence, proof and procedure.

Ms. Rodriquez did not testify under oath in open Court that Mr. Killey 'punched her in the mouth' or that he 'kicked her in the stomach' as she contends now in her brief and there would be no reason for the Trial Court to believe that Mr. Killey did that based on the evidence and testimony of sworn witnesses at trial; Hunter's report notwithstanding.

Her witness did not testify to any assault under oath and testimony by Mr. Killey, Ms. Bradley, Victoria Aid and Mr. Krinke all prove by a preponderance of evidence that Mr. Killey was never observed to assault or to be violent toward Ms. Rodriquez or the children.

3. Mr. Killey Proved By A Preponderance Of The Evidence That His Behavior On 12/4/2013 Was Lawful Behavior. There Is No Legal Basis For A Finding Of Assault.

While the Trial Court may have made an erroneous 'presumption' of assault based on Social Worker's version of the facts, the criminal charges, police reports, photos and witness statements entered into evidence, (EX 6) 'a preponderance' of that evidence weighs heavily in favor of Mr. Killey's innocence.

In rendering a not guilty verdict to the criminal charge of Assault 4 DV the jury determined according to the law that:

a) Mr. Killey was in a place where he had a lawful right to be; his home, while Ms. Rodriquez and Mr. Krinke were trespassing.

b) Mr. Killey was engaged in a lawful pursuit; caring for his sick toddler.

c) Mr. Killey had lawful physical custody of A.S.K. by mutual consent with the child's mother.

d) No weapons, alcohol, drug or paraphernalia were found upon search and photographing of Mr. Killey's apartment. Scene photos reveal a tidy apartment with no signs of a struggle.

e) No situation dangerous to A.S.K. was found upon search of the apartment and officers noted that A.S.K.'s condition was 'calm'.

f) Officers noted that Mr. Killey's condition was sober 'calm and distant'.

g) The only person described as 'hysterical' was Ms. Rodriquez.

h) Exhibits, witness statements to police and testimony at trial confirm that Mr. Killey tried repeatedly to evict Ms. Rodriquez and Mr. Krinke from his home but they would not leave. If Ms. Rodriquez was being assaulted and kicked in the stomach as she alleges she should have accepted Mr. Killey's repeated offers to remove herself from his apartment.

i) Krinke and Rodriquez were engaged in a criminal act of Trespass 1 and forcible abduction of a child from the lawful custody of a parent

having a right to physical custody. It was a criminal act of Custodial Interference in the first degree, a Class C felony 9A.40.060.

j) Under WA 'stand your ground' laws; Mr. Killey had no duty to retreat and applied 'lawful' force to evict Krinke and Rodriquez from his residence.[1]

k) Ms. Rodriquez and Mr. Krinke were acting *'with complete disregard for the rights of another'*

l) The force used when Mr. Killey pushed Ms. Rodriquez out of his room and locked her out was 'lawful' because Mr. Killey did not apply more force than necessary under the circumstances and did not assault, threaten or injure her.

Ms. Rodriquez argument that Mr. Killey, by repeatedly ordering her and Mr. Krinke out of his apartment, was issuing a 'threat' or that they had to 'back out of the house' for fear of being assaulted when it was they who were engaged in criminal acts and threatening behavior against Mr. Killey, his son and his home, does not satisfy even the most gullible mind and certainly did not convince the jury.

It does not matter that Hunter thinks this incident was Mr. Killey's fault.

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[1] WA W.P.I.C. 16.08 It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that *[he][she]* is being attacked to stand *[his][her]* ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.
RCW 9A.16.050, RCW 9A.16.060(1)(a)(b)(c), RCW 9A.16.020(3)

Mr. Killey Proved By a 'Preponderance of the Evidence' That He Did Not Engage In Multiple Acts of Assault As Defined in RCW 26.50.010

4. The Mandatory Language in RCW 26.09.191(2) Is Not Mandatory

Ms. Rodriquez argues that the restrictions imposed on Mr. Killey's residential time with A.S.K. are *'mandated'* under RCW 26.09.191(2) based on her allegations.

Mr. Killey argues that the restrictions imposed in the Parenting Plan for A.S.K. under this Statute are an abuse of discretion, because the Court did not follow the mandate to use the 'best interests of the child.' standard, did not apply the entire Statute, but only a portion of it, specifically, it applied RCW 26.09.191 (2) but did not apply RCW 26.09.191(2) (n) as it relates to Mr. Killey and A.S.K. and that this failure to apply all sections of the Statute represent reversible error.

Ms. Rodriquez's argument that the Trial Court *mus*t ignore the best interests of the child standard and impose *mandatory* restrictions, is a common misinterpretation of Statute.

The clear intent and unambiguous language in RCW 26.09.191 (2) (n) gives the Trial Court broad discretion to impose, modify or ignore the mandatory language in the Statute RCW 26.09.191 (2) (a) as long as the Court uses the 'best interests of the child standard' when it says:

(2) (n) 'if the Court expressly finds based on the evidence that contact between the parent and child will not cause physical, sexual or emotional harm to the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply the limitations of (a) (b) and (m)(i) and (iii) of this subsection, ' or if the Court expressly finds that the parent's conduct did not have an impact on the child then the Court need not apply the limitations of (2) (a) (b) and (m)(i) and (iii)

The Trial Court should have found that the alleged assault in 2010, even if true (which Mr. Killey denies) did not have an impact on A.S.K. because this minor incident occurred before A.S.K. was even born; it is impossible that it had any impact on A.S.K. is an irrelevant and untimely complaint and does not provide a legal basis for imposing restrictions on the father's residential time with A.S.K. under RCW 26.09.191 (2).

The Trial Court did not find that Mr. Killey's contact with A.S.K. posed any risk of physical, sexual or emotional harm to A.S.K., no allegations of any harm were offered by Social Workers or the mother, and therefore, restrictions did not satisfy the intent of the State to provide for the best interests of the child, are not authorized by this Statute and are an abuse of discretion.

The Trial Court's finding of facts and conclusions of law are erroneous. There is no legal basis under this Statute to impose restrictions on Mr. Killey's residential time with A.S.K. The Parenting Plan should be declared void.

5. Other Allegations Of 'Domestic Violence' Were Not Proven.

In regard to rude, inflammatory, insulting and completely unsubstantiated accusations made by Hunter in her DV assessment which included allegations of humiliation, controlling behaviors, harassment, Mr. Killey drank a six-pack every night and so does his mother and brothers, Mr. Killey's brothers all have domestic violence convictions, Mr. Killey ate meth, rape by proxy, Mr. Killey turned off services when he moved out, Mr. Killey tried to get Ms. Rodriquez fired from her job, or had a 'desire' to have Ms. Rodriquez deported, Mr. Killey spent all his money on porno and masturbated in front of the computer and "isn't right in the head' are not a basis for restrictions under RCW 26.09.191(2).

These rude allegations are not designed to help the Court establish a Parenting Plan that is best for Aaron, but are submitted with malice to harass and inflict personal injury on the father and his child.

However, even if any of these behaviors were true and proven by a preponderance of the evidence and found relevant to the best interests of

the child, restrictions imposed based on these factors would fall under RCW 26.09.191 (3) a-g. not RCW 26.09.191 (2)

Allegations that Ms. Rodriquez 'suffered all kinds of violence' and 'humiliation in every form and fashion' are vague and do not present a specific action that can be either proved or disproved, are off-handed comments designed to insult and humiliate Mr. Killey, have no basis in fact and are not supported by even a shred of evidence. All are denied under oath by Mr. Killey, Ms. Bradley and Victoria Aid, who, unlike Social Workers, are individuals with personal knowledge of the parties and who have personal relationships with this family and have personal knowledge of the issues in dispute.

6. The Provisions of RCW 26.09 Apply To Ms. Rodriquez

Ms. Rodriquez admits in her brief that she believes that by making claims of assault consistent with RCW 26.09.191 (2) she may 'trump' the best interests of her child in the dissolution proceedings; assumes that making multiple claims of abuse against Mr. Killey would guarantee her custody of A.S.K., regardless of her parenting history or treatment of A.S.K. and would require the Court to place restrictions on Mr. Killey's relationship with A.S.K., render the remainder of the Parenting Statute that applies to her null and void and require that the 'best interests of the child' standard be shredded.

This assumption is incorrect.

False Allegations of Domestic Violence; a Common Problem.

Allegations of domestic violence are all too common in dissolution proceeding when a child's mother will stop at nothing to sabotage her child's relationship with the father.

In re Marriage of Chandola, 327 P.3d 644 (Wash. 2014), the mother accused the father of sexual abuse of their child. When that did not work, she was able to restrict the father's residential time based on the father's parenting style.

In re Marriage of Cynthia L. Burrill, 113 Wn. App. 1031 (Wash. Ct. App. 2002) the mother alleged sexual assault of their daughter and was successful at having Mr. Burrill arrested, charged and convicted of first degree rape of a child. Mr. Burrill suffered confinement and separation from his child for many months, based on the false allegations of the mother and an incorrect interpretation of medical records by Social Workers. This behavior eventually resulted in a lawsuit against the State of Washington.[2]

Similarly, Mr. Killey may be entitled to relief due to perjury, incomplete and inaccurate investigation, false or inaccurate information submitted to the Court by Social Workers, Advocates, Family Law

[2] Burrill v State 134 Wn. App. 1038 (Wash. Ct. App. 2006)

Facilitator and others who assisted Ms. Rodriquez in separating Mr. Killey from his child without any cause and who were directly involved in creating a situation that caused harm to A.S.K.

In Marriage of Littlefield, 139 Wn. 2d 39 (1997) which concerns parents' conflicting interests in residential schedule with their children, in his concurring opinion, Chief Justice Sanders expresses his opinion of parents like Rodriquez, which is Mr. Killey's opinion as well, when he says:

'I think the majority underestimates the depravity, wickedness, and mean-spiritedness of some who would injure their own child to deprive the other parent of his or her natural and fundamental right to maintain a relationship with their own child.

The Statute says the Court must act to protect the child - and grants it ample legal authority to do just that'.

Justice Sanders also corrects the majority for putting the interests of one parent over the child when he says:

'By implication the majority's dicta seem to say the best interests of the child is secondary to the interests of one of the parents'.

That is Ms. Rodriquez's position; and evidently the position of the Trial Court and Social Workers; that the best interests of A.S.K. are secondary to those of Ms. Rodriquez.

All provisions of the Parenting Act, including provisions for residential time limitations in RCW 26.09.191 (3) (a) (b) (c) (d) (e) (f) (g) and provisions for modification proceedings apply to Ms. Rodriquez.

7. The Petition and Order for Protection initiated Jan. 16 2014 and reissued May 15, 2014 and May 15, 2015 is reviewable in the underlying appeal because;

a) Petition and Order for Protection were entered into evidence and were considered by the Trial Court as proof of the facts alleged.

b) The question before the Court of Appeals is whether sufficient evidence exists to support the Trial Court's finding of facts and ultimate conclusions of law.

c) This Court may review the exhibits entered at Trial and decide whether sufficient evidence supports the Trial Court's finding of facts and ultimate conclusions of law.

d) The Trial Court made an adverse ruling and judgement against Mr. Killey when it incorporated the Order for Protection into the Parenting Plan making it relevant to the judgment under appeal.

e) The Trial Court reissued the Order for Protection on May 15, 2015 for one year without any preponderance of evidence.

Ms. Rodriquez is using the Order for Protection for an improper purpose; to harass Mr. Killey and to deny him access to his child.

The Order for Protection which was incorporated into the Parenting Plan should be vacated because it portrays a false impression to police, physicians and the community that A.S.K. needs protection from Mr. Killey, which was never even alleged, not by any witness at trial and not even by Ms. Rodriquez or Social Workers.

There is no legal basis for the Trial Court to impose an Order for Protection or to impose restrictions on Mr. Killey's relationship with ASK.

8. There Were Allegations and Evidence of Abuse and Neglect in the Care of Ms. Rodriquez and Mr. Krinke That Were Not Properly Considered By the Trial Court

Mr. Killey testified at trial and submitted his video evidence in support of his testimony, that, based on A.S.K.'s dramatic exhibitions of fear of the environment in Ms. Rodriquez's home on multiple occasions, (which was the basis for the disturbance at Mr. Killey's apartment on 12/4/2013), and based on medical records that indicated internal injuries and chronic illness in the care of Ms. Rodriquez, it would be best for A.S.K. if he remain in the father's custody (as was this family's habit before FCS became involved RP pg. 18 @ 20) until A.S.K. showed that he was not fearful to return home with his mother. Although Ms. Rodriquez did request primary residential custody, she did not object to Mr. Killey's assessment or offer any testimony that it would be best for

A.S.K. if she was granted primary care or that it would pose a risk or cause A.S.K. any harm if the father was granted primary care as she regularly left A.S.K. in the care of the father most of the time during the marriage. RP pgs. 15, 75 @ 4-6 and that when A.S.K.was sick on 12/4/2013 Ms. Rodriquez did not take the child to the doctor but brought him to Mr. Killey to take care of him. RP 18

9. The Trial Court Abused Its Discretion When It Failed to Consider Testimony Regarding A.S.K.'S Medical Records and Failed to Enter Medical Records into Evidence.

Ms. Bradley Was Ultimately Qualified To Testify.

The Trial Court erred when it qualified Bradley to testify as an expert witness at trial (RP pg. 42) and then dismissed her (RP pg. 43) and required Mr. Killey to produce a 'licensed physician' or 'figure out some other way to present this evidence' on the day of trial, simply because Bradley aimed to point out injuries to Aaron in Ms. Rodriquez care.

Before being interrupted, Bradley did testify that on January 29, 2014 (less than 2 weeks after Mr. Killey was restrained from contact with A.S.K.) Mr. Krinke brought the child to ER (without either parent present) where A.S.K. was diagnosed with a hole in his heart and fluid in his lungs. RP 40.

The Trial Court does not have broad discretion to admit or exclude expert witnesses, or any witness at trial. The judge has a 'gatekeeper' role and is required to adhere to the rules of 'evidence, proof and procedure'.

In this case, Judge Chung dismissed Bradley based on his personal opinion that Mr. Killey should have found 'a different way' to present his evidence because of the relationship of the witness to the parties and because she was not a 'licensed physician'.

These are not disqualifying tests by any standard. Bradley was qualified under Frey, Daubert and Federal Rules of Evidence 702, 703, as well as civil rules of evidence ER 601 to testify to what is recorded in A.S.K.'s medical records and even to give an opinion as to whether the mother gave proper care and follow up treatment based on the doctor's written orders in the medical record concerning need to return in 48 hours and doctor's orders for additional diagnostic tests, which were not done.

Ms. Bradley was qualified to read the record and draw these conclusions.

The rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or

experience or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, and then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.[3]

Social Workers Hunter and Brewer either overlooked, concealed or did not understand this information and gave the Court an inaccurate report concerning A.S.K.'s health, safety and medical condition, as happened in re Marriage of Cynthia L. Burrill, 113 Wn. App. 1031 (Wash. Ct. App. 2002) when Social Workers incorrectly interpreted medical records that they are not qualified to understand.

Social Workers are not infallible and the Trial Court should not defer to them as if they are.

The Trial Court committed reversible error when it ruled that Social Workers employed by Family Court Services (who were completely lacking in any medical degree, medical training, clinical skills or experience, and lacking any special knowledge in the field of medicine as required by Federal Rules of Evidence 702) were qualified to order medical records, review medical records, interpret medical records and to

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[3] Frye v United States, 293 F. 1013, 1014 (D.C.Cir 1923)
Daubert v Merrell Pharmaceuticals, Inc. U.S. Supreme Ct. 509 U.S. 579 1993
Federal Rules of Evidence 702

give expert testimony regarding A.S.K.'s medical diagnosis, physical condition and regarding the presence or absence of signs of physical neglect or abuse without consulting with A.S.K.'s physician, while Mr. Killey's witness, (who holds an Associate of Applied Science (AAS) degree and specialized in medical office nursing and who has many years of clinical experience including reading and interpreting laboratory, radiology and general medical records) as well as personal observation of A.S.K.'s condition and personal attendance at A.S.K.'s ER visits, is ruled not qualified to testify in regard to A.S.K.'s medical records because she is not a 'licensed physician'.

The Trial Court abused its discretion when it held Mr. Killey to a much higher standard than it imposed on its own employees.

Daubert pointed out that Federal Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the "assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline."

The outright dismissal of a qualified witness was based on untenable grounds and untenable reasons and is an abuse of discretion.

10. Ms. Rodriquez Has Been Reported For Abuse and Medical Neglect of the Child

Respondent claims that doctors are mandated reporters and that no calls have gone out to CPS. This information is incorrect.

Mandated reporters have called CPS, and have informed King County Family Law Court in writing of suspected and obvious signs of neglect and abuse.

Ms. Rodriquez and Mr. Krinke have been under investigation for medical neglect, internal injuries and other mistreatment of A.S.K. by Kirkland Detective, Pediatricians and Social Workers at Children's Hospital Seattle. Ms. Rodriquez was ordered to take the child to Harborview sexual assault and traumatic stress clinic for assessment but she has not complied.

The issues regarding Ms. Rodriquez's care of A.S.K. and court-ordered restrictions on the father's permission to care for the child have in no way been resolved. Ongoing problems of neglect and abuse by the mother and completely unjustified court-ordered restrictions on the father's parental rights are creating a dangerous situation for the child whom the Court is mandated to protect.

Santosky v Kramer , 455 U.S., 745, 102 S Ct. 1388, 71 L. Ed.2d 599 (1982) applies because although Santosky was a termination case, it speaks to the fundamental fairness due all litigants in any proceeding where government seeks to inject itself into the private lives of its citizens.

C. CONCLUSION

This Court should vacate the Parenting Plan imposed by the Trial Court and grant Mr. Killey the relief requested in his Opening Brief.

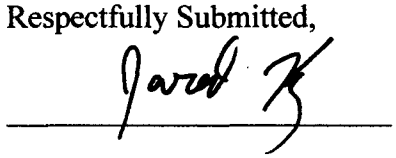
The Court of Appeals should remand for further proceedings and order a GAL to be appointed to protect the best interests of Mr. Killey's child.

The Court of Appeals should remand for a new trial so that the parties can comply with the Court's requirements and subpoena A.S.K.'s pediatrician, radiologist, Social Workers and detectives or any other sufficiently licensed professional expert necessary to make a fully informed judgment concerning the best interests of A.S.K.

MR. KILLEY REQUESTS ORAL ARGUMENT

Date 8/19 2015

Respectfully Submitted,



Jared Bryan Killey
Appellant Pro Se
P. O. Box 5563
Lynnwood WA 98046
206-468-7017

COURT OF APPEALS

OF THE STATE OF WASHINGTON DIVISION 1

Jared Bryan Killey — No. 13-3-13106-8SEA

Petitioner/Appellant — COA No. 72932-2-1

vs. — CERTIFICATE OF SERVICE

Elizabeth Killey/Rodriquez

Respondent

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date I caused to be served by certified mail to

Elizabeth Killey
P. O. Box 802
Woodinville WA 98072

And to her attorney

Leticia Camacho WSBA # 31341
Northwest Justice Project
401 Second Avenue South Suite 407
Seattle WA 98014

APPELLANT'S REPLY BRIEF

Dated this 19 day of August, 2015

Signed Jared K

Jared Bryan Killey
6817-208th SW Box 5563
Lynnwood WA 98036