COA NO. 73047-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES BLUFORD,

Appellant.

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

The Honorable Julia Garratt, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED IN JOINING THE COUNTS FOR TRIAL BECAUSE JOINDER PREJUDICED BLUFORD'S RIGHT TO A FAIR TRIAL.

a. Prejudice is appropriately considered in connection with a joinder decision, and State v. Bryant is good law on this point.

The State claims prejudice is only a factor at the severance stage, not the joinder stage. Based on this premise, the State asks this Court to overrule State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998), review denied, 137 Wn.2d 1017, 978 P.2d 1100 (1999). Brief of Respondent (BOR) at 19. The State is mistaken and this Court should decline the State's request.

State v. Smith, 74 Wn.2d 744, 446 P.2d 571 (1968), vacated in part on other grounds, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972) is the granddaddy of joinder cases. It addresses joinder under RCW 10.37.060. Smith, 74 Wn.2d at 753. Significantly, the Supreme Court later recognized RCW 10.37.060 is consistent with the joinder rule under CrR 4.3. State v. Thompson, 88 Wn.2d 518, 525, 564 P.2d 315 (1977), overruled on other grounds by State v. Thornton, 119 Wn.2d 578, 835 P.2d 216 (1992). The Supreme Court in Smith pronounced the purpose and dangers of joining offenses:

> The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration.

Smith, 74 Wn.2d at 755 (quoting Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964)). The Supreme Court has cited Smith for how joinder can be prejudicial under CrR 4.3. See, e.g., State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994); State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

Significantly, in analyzing whether prejudice resulted from joinder, Smith addressed the very factors that would later come to be imported into the severance analysis: (1) the strength of the State's evidence on each count; (2) the clarity of defenses to each count; (3) the court's instruction to the jury as to the limited purpose for which it was to consider the evidence of each crime; and (4) the admissibility of the evidence of the

other crimes even if they had been tried separately or never charged or joined. Smith, 74 Wn.2d at 755; see State v. Eastabrook, 58 Wn. App. 805, 812, 795 P.2d 151 (1990) ("These factors have since been applied by courts when reviewing severance cases to determine whether the denial of a motion to sever was unduly prejudicial.").

Bryant, in recognizing joinder must be assessed for its prejudicial effect, is consistent with the Supreme Court's decision in Smith. Bryant, 89 Wn. App at 865. Where, as here, there are dueling motions to join and sever considered at the same time by the trial court, the two motions are flipsides of one another or, as the prosecutor put it, "complementary." 1RP 3. The trial court in this case treated them as such. The court requested argument from defense counsel on the motion to sever *before* the State argued joinder because the severance motion "naturally flows then into the State's motion to join all the counts together." 1RP 3. The prosecutor agreed "because the State's motion to join includes the 404(b), which necessarily implies severance, so I think it's six of one, half dozen of the other." 1RP 4.

In this context, based on the way both motions were treated below, it makes little sense to artificially limit the prejudice analysis to the severance motion alone. Cases addressing joinder and severance often blur the distinction between the two decisions because they are intertwined.

Bryant, 89 Wn. App at 865. The blurring reflects the reality that, in practice, simultaneous motions for joinder and severance are not considered separately and there is no meaningful distinction between the two in terms of the need to assess prejudicial effect.

In attempting to support its argument that the prejudice analysis has no role to play on the joinder issue, the State stresses an abuse of discretion standard applies to severance decisions but a de novo standard applies to joinder decisions. BOR at 18-19.

Supreme Court precedent draws no such distinction. The Supreme Court in Thompson expressly applied an abuse of discretion standard to CrR 4.3, the joinder rule. Thompson, 88 Wn.2d at 525. Thompson cited State v. McDonald, 74 Wn.2d 563, 445 P.2d 635 (1968), which applied the abuse of discretion standard to joinder of offenses under RCW 10.37.060. Thompson observed CrR 4.3 is a liberal joinder rule, CrR 4.3 did not supersede RCW 10.37.060, the rule and statute are consistent, and the abuse of discretion standard applies to both. Thompson, 88 Wn.2d at 525.

Consistent with McDonald and Thompson, the Court of Appeals recognizes joinder under CrR 4.3 is discretionary with the trial court. See, e.g., Eastabrook, 58 Wn. App. at 811 ("CrR 4.3 is a liberal joinder rule and the trial court has considerable discretion in joining offenses"); accord

State v. Wills, 21 Wn. App. 677, 679, 586 P.2d 543 (1978); State v. Pleasant, 21 Wn. App. 177, 181, 583 P.2d 680 (1978).

Some Court of Appeals cases have said a CrR 4.3 joinder decision is reviewed de novo rather than for abuse of discretion. Those cases conflict with the Supreme Court precedent and Court of Appeals cases cited above. The origin of this deviation in the case law is State v. Hentz, which cited a federal case involving the federal rule as authority. State v. Hentz, 32 Wn. App. 186, 189, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn. 2d 538, 663 P.2d 476 (1983). Hentz cited Thompson for the proposition that "if joinder was proper, the question of severance under CrR 4.4 is within the discretion of the trial court." Hentz, 32 Wn. App. at 189. Thompson, however, expressly applied the abuse of discretion standard to the joinder rule under CrR 4.3, not CrR 4.4. Thompson, 88 Wn.2d at 825. Hentz misread or ignored Thompson on this point.

The Court of Appeals in State v. Wilson simply disagreed with the Supreme Court's decisions in Thompson and McDonald: "While the Washington Supreme Court has blurred the distinction between joinder and severance so carefully drawn in federal law by referring to it as a broad rule, we do not believe the former joinder rule so broad as to change the standard of review from that of an error of law to one of an abuse of discretion." State v. Wilson, 71 Wn. App. 880, 886, 863 P.2d 116 (1993),

rev'd on other grounds, 125 Wn.2d 212, 883 P.2d 320 (1994). What Wilson had to say on this point is a nullity because the Supreme Court's decisions on the matter are binding on the lower courts. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Properly understood in light of Supreme Court precedent, the standard of review for both joinder and severance decisions is abuse of discretion. There is no distinction in this regard, and the State's contrary argument collapses.

b. If Bryant is overruled, then the severance error should be reviewed under RAP 2.5(a) in the interest of justice.

If this Court nonetheless agrees with the State that the prejudice analysis has no role to play in assessing the joinder decision and overrules Bryant, then Bluford requests that this Court exercise its discretion to consider the prejudicial effect of denying the severance motion under RAP 2.5(a).

"RAP 2.5(a) is discretionary." State v. Harris, 102 Wn. App. 275, 279, 6 P.3d 1218 (2000), aff'd, 146 Wn.2d 339, 46 P.3d 774 (2002). An "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). This would apply to defense counsel's failure to renew the motion to sever during trial. But "the rule never operates as an absolute bar to review." State v. Ford, 137 Wn.2d

472, 477, 973 P.2d 452 (1999). Appellate courts always retain the discretion to reach the merits of unpreserved errors. State v. Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015); McRae v. Tahitian, LLC, 181 Wn. App. 638, 644, 326 P.3d 821 (2014) (party waived objection by failing to timely assert it but error reviewed on appeal). "While RAP 2.5(a) embodies the principle that errors not raised in the trial court may generally not be raised for the first time on appeal, RAP 1.2(a) mitigates the stringency of the rule, providing that the RAPs are to 'be liberally interpreted to promote justice and facilitate the decision of cases on the merits.'" State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011).

In the interest of justice, this Court should exercise its discretion to consider the prejudicial effect of denying the severance motion. Bluford understandably relied on the precedential force of Bryant in raising the challenge to the trial court's joinder decision on appeal. If Bryant is overruled, then Bluford falls victim to a game of "gotcha!" unless this Court reviews the merits of the substantive issue related to severance. The label changes from joinder to severance, but the substance of the prejudice argument remains the same. The State is in no way harmed by consideration of the severance issue. The requisite factors and prejudice analysis in relation to severance are identical to that already set forth in the

briefing from both parties. The State has already responded to the argument.

Further, waiver of the severance issue by trial counsel's failing to renew the motion is purely technical in this case. The general rule requiring a party to raise an issue at the trial level "exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond." Blazina, 182 Wn.2d at 833. But here, the error was the denial of the pre-trial motion to sever, to which the State responded. Renewal of the motion would not have changed the trial court's decision. Nothing happened at trial that would trigger reassessment of the pre-trial decision. Renewal of the motion would have been a futile act because the trial court had already denied the pre-trial severance motion and nothing happened during trial to change that decision. See State v. McCreven, 170 Wn. App. 444, 473, 284 P.3d 793 (2012) (where objection would be futile and no corrective purpose would be served by raising a proper objection at trial, the lack of objection does not preclude appellate review) (citing State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996)); State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996) (issue properly before appellate court where objection would have been "a useless endeavor").

For these reasons, Bluford requests that this Court reach the merits of the severance issue if Bryant is overruled.

2. BLUFORD WAS ENTITLED TO INSTRUCTION ON FOURTH DEGREE ASSAULT AS A LESSER OFFENSE TO INDECENT LIBERTIES AND THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GIVE IT.

As argued on appeal, the reasoning of State v. Stevens, 158 Wn.2d 304, 311, 143 P.3d 817 (2006) eclipses State v. Thomas, 98 Wn. App. 422, 989 P.2d 612 (1999) and shows why the legal prong of the test is met for fourth degree assault as a lesser offense of indecent liberties. Amended Brief of Appellant (ABOA) at 34-38. The State does not dispute the point, thereby conceding it. See In re Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it."); State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) ("The State does not respond and thus, concedes this point.").

The State contends defense counsel invited or waived the error. BOR at 37-40. This claim fails.

A defendant waives the right to argue on appeal that lesser offense instructions should have been given when the defendant objects to such instruction at trial. State v. Hoffman, 116 Wn.2d 51, 111-13, 804 P.2d 577 (1991). Here, Bluford's counsel requested the lesser offense instructions. CP 60-66; 29RP 75-77. There is no waiver.

Invited error applies when the defendant does not request a lesser offense instruction at trial and then complains on appeal that such instruction should have been given. State v. Mak, 105 Wn.2d 692, 747-48, 718 P.2d 407 (1986). Here, Bluford's counsel requested the lesser offense instructions and maintained that request even when confronted by unfavorable authority. CP 60-66; 29RP 75-77. There is no invited error under Mak.

The State bears the burden of proving invited error. State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 154 (2014). For the invited error doctrine to apply, the State must prove the defendant "materially contribute[s] to the error challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error." Mercado, 181 Wn. App. at 630.

Attorney Tavel responded to the prosecutor's contention that State v. Thomas controlled by conceding that Thomas ascribed a higher mens rea to assault than it did to indecent liberties. 29RP 74. Tavel did no more than acknowledge what Thomas held. Yet he persisted in making the request for the lesser offense instruction on the theory that the jury could find Bluford committed fourth degree assault with its intent requirement. 29RP 74-75. Attorney Hicks (Bluford's other attorney) then asked the court to consider whether there is "applied intent in indecent liberties."

29RP 76. The trial judge reviewed the Thomas decision for herself and then ruled Thomas controlled because the legal prong of the test was unmet. 29RP 76-77. The trial judge assessed Thomas and found it controlling. Attorney Tavel did not invite or waive the error by acknowledging what Thomas held.

Defense counsel's theory was that instruction on fourth degree assault should be given because the jury could find Bluford committed that offense. In that regard, counsel asked the court to consider whether there was "applied intent in indecent liberties." 29RP 76. That theory is consistent with the one raised on appeal: the "sexual contact" aspect of indecent liberties requires the person to touch with the purpose of gratifying sexual desire, thereby incorporating the "intent" element of assault.

Even if Bluford's argument on appeal is considered a newly articulated theory for why the instruction should have been given, the instructional error should be reviewed because it is "arguably related" to the issue raised in the trial court. Mavis v. King County Public Hosp. No. 2, 159 Wn. App. 639, 651, 248 P.3d 558 (2011) (citing Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007)). Bluford's trial counsel did not need to cite State v. Stevens to preserve the issue for appeal. See Walla Walla County Fire Protection

Dist. No. 5 v. Washington Auto Carriage, Inc., 50 Wn. App. 355, 357 n.1, 745 P.2d 1332 (1987) ("There is no rule preventing an appellate court from considering case law not presented at the trial court level.").

3. THE STATE DID NOT PROVE PRIOR OUT-OF-STATE OFFENSES ARE COMPARABLE TO THE WASHINGTON OFFENSE OF ROBBERY, AND SO THE COURT ERRED IN IMPOSING A PERSISTENT OFFENDER SENTENCE.

a. The South Carolina robberies are not comparable to Washington robbery.

For a South Carolina robbery, the intent to steal need not have existed at the time of obtaining possession of the stolen goods. State v. Hyman, 276 S.C. 559, 566, 281 S.E.2d 209 (S.C. 1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (S.C. 1991). For a Washington robbery, the intent to steal must exist at the time of the taking. State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 715 (2012); State v. Byers, 136 Wn. 620, 622, 241 P. 9 (1925); State v. Garman, 76 Wn.2d 637, 647, 458 P.2d 292 (1969). The offenses are therefore not legally comparable.

The State claims the South Carolina robbery convictions are comparable to Washington robbery because Washington has adopted a transactional view of robbery. BOR at 48. The transactional theory, however, does not demonstrate legal comparability here.

"The transactional view of robbery as defined in Washington's robbery statute requires that the force be used to either obtain or retain property or to overcome resistance to the taking." State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005). Under the transactional view, "the force or threat of force need not precisely coincide with the taking," as "[t]he taking is ongoing until the assailant has effected an escape." State v. Truong, 168 Wn. App. 529, 535-36, 277 P.3d 74 (2012) (citing State v. Manchester, 57 Wn. App. 765, 770, 790 P.2d 217 (1990)). Thus, "a taking can be ongoing or continuing so that the later use of force to retain the property taken renders the actions a robbery." State v. Handburgh, 119 Wn.2d 284, 290, 830 P.2d 641 (1992).

From the above authority, it is apparent that if there is no later use of force to retain the property, then the taking is complete at its inception and the transactional theory is not implicated. Stated another way, if there is no subsequent force used to retain possession of the property or to prevent or overcome resistance to the taking property of another, the taking is complete when the property is initially obtained by means of force.

The flaw in the State's reasoning is thus revealed. In Washington, a robbery occurs when property is taken by forcible means with intent to steal, and that intent must exist at the time of the taking. Sublett, 176

Wn.2d at 88 ("robbery requires (1) *taking* (2) personal property (3) from another person or from another's immediate presence (4) against his or her will (5) by force or threatened force (6) *with the specific intent to steal.*"); Byers, 136 Wn. at 622 ("Robbery includes the elements of the crime of larceny, one of which is an intent to deprive the owner or other persons of the things taken."); Garman, 76 Wn.2d at 647 (to prove larceny by taking, there must be "a felonious intent in the initial instance of making an unlawful acquisition and then a subsequent appropriation of that property.").

A South Carolina robbery, on the other hand, can occur when property is taken from another by forcible means without the intent to steal, so long as the intent to steal is subsequently formed. In Hyman, the defendant argued "intent to steal must occur simultaneously with the taking of the property to constitute robbery." Hyman, 276 S.C. at 566. The South Carolina Supreme Court rejected the argument because "the intent to steal need not have existed at the time of obtaining possession of the stolen goods." Id. (citing State v. Craig, 116 S.C. 440, 107 S.E. 926 (S.C. 1921)).

Hyman is not a transactional robbery case. Hyman did not base its holding on a transactional theory. Hyman does not cite to any case involving a transactional theory. Hyman did not limit its holding to

situations where property was initially taken without intent to steal but later forcefully retained with intent to steal. Nothing in South Carolina law requires the existence of intent to steal at the time of a taking accomplished by means of force, whether that force is used at the initial taking or later used to escape with the property.

A person could be convicted of a South Carolina robbery even though the intent to steal is not formed until after the taking whenever that taking is deemed complete, whereas the Washington robbery offense requires that the intent to steal must exist at the time of the taking. The South Carolina robbery offense is therefore broader than the Washington robbery offense and is not legally comparable. The State does not contest the offenses are factually incomparable.

b. The New Jersey robbery is not comparable to Washington robbery.

The original charge for the New Jersey offense was first degree robbery. CP 309, 315-16. But Bluford pled guilty to an amended charge of second degree robbery. CP 309. The amended charging document to which Bluford pled guilty is not part of the record. As argued, the State cannot prove legal comparability to Bluford's New Jersey robbery conviction because we do not know what prong of the robbery statute he pled guilty to. New Jersey's robbery statute is broader because injury or

threat of injury is not required — a person can commit robbery by committing "any" first or second degree crime in the course of committing theft. N.J.S.A. 2C:15-1(a)(3).

The State is unable to cite to a single case where the State was able to prove the comparability of an offense where a defendant pled guilty but the charging document to which he pled guilty was not in the record. The State nonetheless contends Bluford presumably pled guilty to the same prong of robbery identified in the original charging document because the amended charging document does not appear in the record. BOR at 50. But there could be any number of reasons why the amended charging document does not appear in the record. One potential reason is that the State simply failed to get it. Another possible reason is that South Carolina authorities failed to keep a copy of the amended charging document and so there is no such document to acquire.

The bottom line is that appellate courts "may not speculate upon the existence of facts that do not appear in the record." State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977). More particularly, in examining whether the State proved the comparability of offenses, courts "cannot assume the existence of facts that are not in the record." State v. Werneth, 147 Wn. App. 549, 555, 197 P.3d 1195 (2008). In the absence of the charging document that contains the elements of the crime to which he

pled guilty, it is speculation that Bluford pled guilty to the prong of the robbery statute that required use or threat of force.

The State's claim that the trial court's comments describing the offense show what charge Bluford pled guilty to is unsupported by citation to authority. BOR at 51. Argument for which no authority is cited nor supported may not be considered on appeal. King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 717, 846, 846 P.2d 550 P.2d 550 (1993). The failure to cite authority constitutes a concession that the argument lacks merit. State v. McNeair, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997).

As argued, a second barrier to legal comparability is that, under the New Jersey statute, one can commit robbery in the attempt to commit a theft. N.J.S.A. 2C:15-1(a). ABOA at 50-51. Washington's robbery statute requires the offender to actually take the property of another. RCW 9A.56.190 ("unlawfully takes personal property from the person of another or in his or her presence").

The State responds that the Washington offense of attempted robbery still qualifies as a "most serious offense" and so the New Jersey conviction remains legally comparable. BOR at 51-52. The State, however, fails to take into account the differing mens rea for each crime.

In Washington, "[a]n attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the

commission of that crime." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Thus, to prove attempted robbery, there must be an intent to commit the crime of robbery; i.e., a person must intend to steal another's property by means of force. RCW 9A.56.210 (defining crime of robbery); RCW 9A.28.020(1) ("A person is guilty of an attempt to commit a crime if, *with intent to commit a specific crime*, he or she does any act which is a substantial step toward the commission of that crime."). If one merely intended to take the property of another without use of force, that person would be guilty of attempted theft rather than attempted robbery.

In New Jersey, the required mens rea for the force aspect of robbery is mere knowledge. State v. Sewell, 127 N.J. 133, 145, 147-49, 603 A.2d 21 (N.J. 1992). Thus, one can be found guilty of robbery in New Jersey by knowingly attempting to take property by means of force. In Washington, one cannot be guilty of attempted robbery without intending to take property by means of force. As a result, the two offenses are legally incomparable. The State does not contest the offenses are factually incomparable.

If Bluford is correct that the New Jersey offense is incomparable to a Washington "most serious offense," then he cannot be sentenced as a persistent offender even if the two South Carolina robbery convictions are comparable. As argued in the opening brief, to qualify as a "most serious

offense," "at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted[.]" RCW 9.94A.030(38). Bluford pled guilty and was sentenced on the same day for both South Carolina offenses. CP 331-32. As a result, the South Carolina convictions would not count as two strike offenses. The State does not contest this point. Bluford cannot be sentenced as a persistent offender because he does not have two previous convictions for "most serious offenses" as defined in RCW 9.94A.030(38).

B. CONCLUSION

For the reasons set forth above and in the opening brief, Bluford requests that this Court reverse the convictions. In the event this Court declines to reverse the convictions, then the case should be remanded for resentencing.

DATED this 26th day of April 2016

Respectfully Submitted,

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73047-9-I
	)	
CHARLES BLUFORD,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 26TH DAY OF APRIL 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHARLES BLUFORD
DOC NO. 335200
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF APRIL 2016.

X Patrick Mayovsky