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63334-1

No. 63334-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL THRASHER,

Appellant.

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor violated Michael Thrasher's state and federal constitutional right to remain silent by (1) eliciting evidence that Mr. Thrasher referred the investigating police detective to his attorney instead of answering the detective's questions and (2) using Mr. Thrasher's failure to talk to the detective as substantive evidence of guilt.

2. The prosecutor violated Michael Thrasher's state and federal constitutional right to due process of law by (1) eliciting evidence that Mr. Thrasher referred the investigating police detective to his attorney instead of answering the detective's questions and (2) using Mr. Thrasher's referring the detective to his attorney as substantive evidence of guilt.

3. Mr. Thrasher did not receive effective assistance of counsel because his attorney failed to submit a necessity instruction.

4. Cumulative error denied Mr. Thrasher a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal defendant has the constitutional right to remain silent, and the prosecutor may not elicit testimony concerning the defendant's exercise of that right or argue his decision to remain

silent indicates guilt. U.S. Const. amends. V, XIV; Const. art. I, § 9. The State elicited testimony Mr. Thrasher did not answer a police detective's questions, refused to meet with the detective, and told the detective to call his attorney. Where the prosecutor used Mr. Thrasher's assertion of his right to silence as evidence of guilt, was his constitutional right to silence violated?

2. A criminal defendant has the constitutional right to counsel as well as the right to consult with an attorney before waiving his constitutional right to remain silent. U.S. Const. amends. V,VI, XIV; Const. art. I, §§ 9, 22. The State elicited testimony Mr. Thrasher did not answer a police detective's questions, refused to meet with the detective, and told the detective to call his attorney. Where the prosecutor used Mr. Thrasher's assertion of his right to counsel as evidence of guilt, was his constitutional rights to due process violated?

3. A criminal defendant has the constitutional right to effective assistance of counsel at trial, and defense counsel is responsible for investigating the facts and law of the case. U.S. Const. amends. VI, XIV; Const. art. I § 22. Mr. Thrasher testified he was unable to report in person every week to the King County Sheriff's office in downtown Seattle because he was too ill to travel

there from a residence in Kent where he was permitted to stay temporarily while he was homeless. Mr. Thrasher's attorney, however, was not familiar enough with the facts or law to propose a jury instruction on the defense of necessity. Where Mr. Thrasher was seriously ill, prevented by his health from complying with the registration statute and would thus have been entitled to a jury instruction on the necessity defense, did he receive effective assistance of counsel?

4. A defendant's constitutional right to a fair trial may be violated by the combination of several errors during trial. U.S. Const. amend. XIV; Const. art. I, § 3. The State used Mr. Thrasher's exercise of his constitutional rights to silence and to counsel as substantive evidence of his guilt, and his attorney did not offer a necessity instruction that would have permitted the jury to consider his defense. Did the cumulative effect of the above errors violate Mr. Thrasher's constitutional right to due process of law and a fair trial?

### C. STATEMENT OF THE CASE

40-year-old Michael Thrasher was disabled and living in King County on a very limited income in 2008. 3/19/09RP 51, 53. He suffered from a variety of physical problems, including epilepsy,

torn ligaments in his right leg, arthritis in both hips, lesions on his lungs and liver, and hepatitis A. 3/19/09RP 53-58, 60-61, 64, 70-71. He did not own a car or have a place to live. 3/19/09RP 51-53.

Mr. Thrasher was required by Washington law to register with the county sheriff because of a conviction for a sexual offense. CP 216, 262; 3/19/09RP 9, 29-30, 49. Registration entailed providing a current address and contact information to the sheriff's office or, if he was homeless, checking into the sheriff's office in person once a week on Monday or Friday and reporting where he was staying. 3/19/09RP 28-31, 38-39.

The King County Prosecutor charged Mr. Thrasher with failing to register as a sex offender, RCW 9A.44.130(11)(a), between April 14 and July 14, 2008. The prosecutor alleged Mr. Thrasher did not provide a complete residential address, or in the alternative, did not report weekly in person as required if he did not have a fixed address. CP 1-2, 8-9.

At trial, the King County Sheriff's Department records custodian testified that on April 25, 2008, Mr. Thrasher came in person to the Sheriff's office in the King County Courthouse and filed a change of address form reporting his new address was 512 Third Avenue in Seattle, Number 210. 3/19/09RP 28, 44-45; Ex. 4.

On May 15, Mr. Thrasher again appeared in person to notify the sheriff that his new address was 1213 Third Avenue, Number 210. 3/19/09RP 42-44; Ex. 3. Mr. Thrasher provided his telephone number and listed Harborview Hospital as additional contact information. 3/19/09RP 46-48, 54; Ex. 3.

On June 16, 2008, Mr. Thrasher appeared in person at the sheriff's office in Seattle to report that he was homeless, residing near the 1000 block of Virginia. 3/19/09RP 35-37; Ex. 1. However, he did not check in with the sheriff's office from the week beginning June 23 to the week beginning August 25, 2008. 3/19/09RP 41-42.

Mr. Thrasher explained that he did not have a permanent address during this time period and was too ill to travel weekly to the sheriff's office in downtown Seattle. At one point in April 2008, Mr. Thrasher spent a few days at a motel in Kent or Renton. 3/19/09RP 65-65, 77-78. He also slept on the couch of a friend, Kayla Frias, who resided in a rural part of Kent. 3/19/09 53, 54, 79.

Because of a torn meniscus in his right leg and arthritis in his hips, Mr. Thrasher could only walk a few hundred feet without extreme pain and could not walk at all without a brace. 3/19/09RP54-55. It was difficult for Mr. Thrasher to get to downtown Seattle because Ms. Frias resided five or six miles from

a bus stop; additionally he could not always afford the bus fare. 3/19/09RP 67-71. For example, Mr. Thrasher was so ill that he went to the Valley Medical Center emergency room on April 22 suffering from vomiting, diarrhea, rectal bleeding and large blisters on his feet. 3/19/09RP 57-58.

Seattle Police Detective John Vrandenburg verifies the addresses of registered sex offenders residing in the city. 3/19/09RP 8. Detective Vrandenburg believed the addresses Mr. Thrasher reported on his April 25 and May 15, 2008, change of address forms were false. 3/19/09RP 9-10, 16-17. The detective testified that the King County Courthouse is at 516 Third Avenue, so there is no 512 Third Avenue, Number 210. 3/19/09RP 9. The detective also checked the homeless shelter across the street and discovered Mr. Thrasher was not registered there. 3/19/09RP 9-11.

Detective Vrandenburg therefore left a message on the telephone number Mr. Thrasher provided on the address change form. 3/19/09RP 11. When Mr. Thrasher called back, Detective Vrandenburg asked Mr. Thrasher to meet him at his address. 3/19/09RP 11-12. According to the detective, Mr. Thrasher got upset, "wanted to argue" by asserting he did not have to talk to the officer and asking the detective to talk to his attorney. 3/19/09RP

12-16. Mr. Thrasher provided his attorney's name and number to the detective. 3/19/09RP 13-14.

Detective Vrandenburg also testified the address Mr. Thrasher reported on May 15 – 1213 Third Avenue, Number 210 – “didn't exist” because it was a commercial building. 3/19/09RP 16-17. The detective again called Mr. Thrasher and told him he knew he was registering at false addresses. 3/19/09RP 17. Mr. Thrasher, however, “wanted to argue again” and claimed the detective was harassing him. 3/19/09RP 17-20. At one point in the conversation, Mr. Thrasher said he was homeless. 3/10/09RP 18.

At trial Mr. Thrasher explained he believed the address he had provided to the sheriff's office was the address for Family and Adult Services on Third Avenue, an agency that provides services for the homeless and acts as his payee for disability and medical benefits. 3/19/09RP 73, 75.

The jury convicted Mr. Thrasher of failing to register as a sex offender. CP 217. He was sentenced to 43 months in prison followed by community custody. CP 258. Mr. Thrasher appeals. CP 253-54.

#### D. ARGUMENT

##### 1. THE PROSECUTOR VIOLATED MR. THRASHER'S CONSTITUTIONAL RIGHTS BY ELICITING TESTIMONY AND COMMENTING ON HIS EXERCISE OF HIS CONSTITUTIONAL RIGHTS TO REMAIN SILENT AND TO COUNSEL

A criminal defendant has the right to remain silent when questioned by the police and to consult with an attorney, and the State may not comment on a defendant's exercise of those rights to imply guilt. The deputy prosecuting attorney elicited testimony that Mr. Thrasher refused to talk to an investigating police detective and asked the detective to talk to his lawyer. The prosecutor then argued in closing argument this conduct was suspicious and implied guilt. The prosecutor's misconduct violated Mr. Thrasher's constitutional rights to silence and to counsel, and his conviction must be reversed.

a. The State may not elicit testimony or comment on a defendant's exercise of his constitutional rights. The federal and state constitutions guarantee both the right to remain silent and the right to counsel to a person accused of a crime. U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 9, 22. The State may not introduce evidence that a defendant exercised his constitutional rights or comment on the defendant's exercise of his right to remain

silent, whether the right is exercised before or after arrest. Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); Miranda v. Arizona, 384 U.S. 436, 468 n.37, 86 S.Ct. 602, 16 L.Ed.2d 694 (1966); State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

The Miranda warnings constitute an “implicit assurance” to the defendant that his silence will not be used against him in court, and the use of silence after Miranda warnings violates due process. Doyle, 426 U.S. at 617-18. Moreover, in light of the Miranda warnings, silence in the face of police questioning is not indicative of guilt, but is “insolubly ambiguous.” Id. at 617. This same reasoning applies to pre-arrest silence, as the right to silence is not limited to post-arrest questioning. Easter, 130 Wn.2d at 238-39, 241.

It is unconstitutional for the State to take any action that unnecessarily chills or penalizes the defendant’s assertion of a constitutional right. Thus, the prosecuting attorney may not invite the jury to draw a negative inference from the defendant’s exercise of a constitutional right. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) (comment on defendant’s failure to

testify); Doyle, 426 U.S. at 619-20 (post-arrest silence); Burke, 163 Wn.2d at 217 (pre-arrest silence); Easter, 130 Wn.2d at 241 (accord); State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988) (post-arrest silence); State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (evidence of defendant's legal gun collection where weapons unrelated to crime); State v. Hager, \_\_\_ Wn.App. \_\_\_, 2009 WL 2832088 (No. 37539-7-II, Sept. 3, 2009) (detective's comment that defendant "evasive" during questioning violated privilege against self-incrimination); State v. Moreno, 132 Wn.App. 663, 672-73, 132 P.2d 1137 (2006) (right to self-representation); State v. Jones, 71 Wn.App. 798, 811-12, 863 P.2d 85 (1993) (right to confront witnesses), rev. denied, 124 Wn.2d 1018 (1994).

This Court reviews violations of constitutional rights under the constitutional harmless error standard set forth in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The test requires the State to demonstrate the error was harmless beyond a reasonable doubt. Burke, 163 Wn.2d at 222-23; Easter, 130 Wn.2d at 242; State v. Toth, \_\_\_ Wn.App. \_\_\_, 2009 WL 3086492 at \*2 (No. 38223-7-II, Sept. 29, 2009).

b. The State improperly used Mr. Thrasher's request that the investigating police officer talk to his counsel rather than to him as evidence of guilt. Here the prosecutor elicited testimony that Mr. Thrasher refused to talk to the investigating police detective and asked the detective to contact his lawyer and commented in closing argument that the jury could infer guilt from Mr. Thrasher's use of counsel. In addition, the prosecutor cross-examined Mr. Thrasher about his failure to discuss his illness with the detective and argued the jury could infer guilt from this omission.

First, the prosecutor elicited from Detective Vrandenburg his telephone conversations with Mr. Thrasher during the course of his investigation. The first conversation occurred in May when the detective was attempting to verify the address Mr. Thrasher reported on April 25. 3/19/09RP 9, 12-13. Mr. Thrasher told the detective that he did not have to comply with his request to meet him at his address and discuss his compliance with registration requirements. 3/19/09RP 13. Mr. Thrasher said he did not have to talk to the detective and told the detective to call his lawyer. 3/19/09RP 12-13, 16. The detective related that Mr. Thrasher "refused" to meet with him, "got upset and wanted to argue." 3/19/09RP 13, 15. The detective implied Mr. Thrasher's request

that the detective talk to his attorney was argumentative and uncooperative:

Vrandenburg: Well, I told him that I needed to verify his registered address and he argued and said he didn't do that before, so I tried ---

DPA: Did you --- sorry, did you ask him to go anywhere or do anything at that point?

Vrandenburg: I just asked to meet him at the address, so I could verify that he was there.

DPA: Okay and what was his response to that request?

Vrandenburg: He refused.

DPA: Okay, how did that phone call continue?

Vrandenburg: Well it went downhill, he got upset and wanted to argue and then he said well you can talk to my attorney.

Defense Counsel: Objection.

Vrandenburg: So I got his attorney's name and phone number.

Court: Did you say something, Mr. Ewers?

Defense Counsel: Yeah, objection your honor.

Court: Okay, well if you'd ask another question please Ms. Charlton.

DPA: What did Mr. Thrasher tell you next?

Vrandenburg: Well, what -- what he told me next -- he told me to call his attorney. So ---

DPA: How did you respond?

Vrandenburg: I said I would do that. So he gave me the attorney's name and phone number.

DPA: Okay and did your conversation end at that point or did it continue?

Vrandenburg: I'm not sure if that was at the end of the conversation or not, but it ended soon after that.

DPA: At any point did you make any comments about the address he had registered to?

Vrandenburg: Oh, yes I – I told him that I suspected that he was registering at a false address.

DPA: How did he respond to that?

Vrandenburg: He wanted to argue.

DPA: Okay and at what point did the conversation end?

Vrandenburg: I think it ended just at the point where I got his attorney's name and number.

...

DPA: And how would [you] describe the overall tenor of that conversation?

Vrandenburg: Well, he was upset with me. He was you know began to yell, he wanted to argue but I just – I wasn't – I wasn't engaging him and I told him that I wouldn't argue. I just said I simply wanted to verify his address and he said well you can talk to my attorney about this because I don't have to talk to you.

3/19/RP 13-16.

The State elicited further information concerning Mr. Thrasher's request for counsel when questioning Detective Vrandenburg about his later investigation of the address Mr. Thrasher provided on May 15. 3/19/09RP 16-17. The detective contacted Mr. Thrasher, not his attorney, and told Mr. Thrasher, "I know what you're up to, you're registering at false addresses." 3/19/09RP 17. The detective testified Mr. Thrasher was again argumentative, used expletives, and accused the detective of harassing him, even though the detective was only trying to get Mr. Thrasher into compliance with the registration statute. 3/19/09RP 17-19. Again, Mr. Thrasher directed the detective to contact his attorney. 3/19/09RP 19.

DPA: Okay, did he make any accusations?

Vrandenburg: Yeah, he – he said I was harassing him.

DPA: He say anything else?

Vrandenburg: He may have, I would have to refer to my notes. . . . Well, he – he added that he would – he would sue me, if I didn't quit harassing him.

DPA. Okay.

Vrandenburg: And to not to call him back, I had to talk to his attorney.

DPA: And how did that conversation end?

Vrandenburg: I believe I hung up the phone that time.

DPA: Are you sure?

Vrandenburg: I could look at my notes again? . . .  
Okay. Oh he hung up, he hung up.

3/19/09RP 18-19.

When Mr. Thrasher testified in his own behalf, he did not discuss his conversations with the detective. 3/19/09RP 51-71. The prosecutor nonetheless cross-examined Mr. Thrasher about why he did not tell Detective Vrandenburg about his medical issues, and Mr. Thrasher responded that he told the detective to contact his lawyer and did not discuss the facts of the case. 3/19/09RP 82.

In her closing argument, the deputy prosecuting attorney continued the theme that Detective Vrandenburg was simply doing his job by giving Mr. Thrasher the “opportunity to talk about” his case, but the honest detective was met with belligerence, including the unreasonable demand that he talk to Mr. Thrasher’s lawyer.

3/19/09RP 101-02.

[S]o what did Detective Vrandenburg do? Well he gave Mr. Thrasher the opportunity to talk to him about it. He told you his goal is to get him in compliant [sic]. So he called Mr. Thrasher at his phone number that’s provided on all the registration forms, that he provided to the hospital when he went in, that he’s told you was his phone number and Detective Vrandenburg calls

that number and is met with belligerence. Why are you calling me? I've never had to verify my address before. You can talk to my attorney. Not I'm sick, I – I'm having a problem registering, I'm sorry, I must not have – I must not have known the right address. No, that's not what Detective Vrandenburg got on the other end of the line. He got someone yelling at him.

3/19/09RP 100-01. The prosecutor made the same argument concerning the detective's second telephone call to Mr. Thrasher – telling the jury the detective was simply trying to help Mr. Thrasher and give him "the opportunity to explain himself," but saw met with "belligerence." 3/19/09RP 101-02. In rebuttal, the prosecutor asserted that the reason Mr. Thrasher argued with the detective was that he knew he was violating the registration law. 3/19/09RP 111-12.

[H]e knew what he had to do to comply with his registration requirement. He just was hoping no one was going to call him on it, when he gave them a fake address. That's why he argued with Detective Vrandenburg, well I never had to verify my address before. He was hoping that no one was going to figure out that he gave them a bogus address.

3/19/09RP 111-12.

c. The prosecutor's use of Mr. Thrasher's pre-arrest silence to imply guilt violated his constitutional right to remain silent. The prosecutor here elicited testimony that Mr. Thrasher refused to discuss his address with the detective and referred him to his

attorney. The prosecutor also argued Mr. Thrasher's refusal to cooperate with the detective was due to his knowledge that he was out of compliance with the registration requirements. Mr. Thrasher's refusal to answer questions about his address and referral of the detective to his attorney were valid exercises of his constitutional right to remain silent. The State's use of this evidence unconstitutionally burdened Mr. Thrasher's constitutional right.

Washington courts have long held the use of a suspect's pre-arrest silence as substantive evidence of guilt implicates the Fifth Amendment. Burke, 163 Wn.2d at 214; Easter, 130 Wn.2d at 235. Even if the defendant testifies at trial, his pre-arrest silence may not be used as substantive evidence of guilt. Burke, 163 Wn.2d at 217; State v. Lewis, 130 Wn.2d 700, 705-06, 927 P.2d 235 (1996). While a passing reference to pre-arrest silence may not violate this rule, the prosecutor may not invite the jury to infer guilt from silence without violating the Fifth Amendment and article I, section 9 of the Washington Constitution. Burke, 163 Wn.2d at 217.

The use of Mr. Thrasher's silence is reminiscent of the unconstitutional use of silence recently addressed by the

Washington Supreme Court in Burke. There, the defendant was accused of having sex with an underage girl at a party. Burke, 163 Wn.2d at 207-08. When the police came to his home, Burke told the officer he had consensual sex at the party with someone who was younger than he thought she was. Id. at 207. When asked if he knew the girl's age, he said he did not know her age but knew she was in high school. Id. At that point, Burke's father asked if his son would be charged and suggested Burke not speak further with the police until he spoke to an attorney. Id. The police therefore ended the interview, but as they were leaving, Burke said girls from that high school were always trying to get guys in trouble. Id. At trial, Burke testified the girl told him she was 16 years old. Id. at 208.

The prosecutor elicited testimony from the police about the conversation with Burke, cross-examined Burke about the conversation, and stressed in both opening and closing argument that Burke would have told the police if the girl had really said she was 16. Burke, 163 Wn.2d at 208-09, 222. Thus, while the prosecutor could have constitutionally used Burke's pre-arrest silence to impeach him when he testified at trial, the prosecutor

violated his constitutional rights by using his silence as substantive evidence of guilt. Id. at 218.

In Burke, the prosecutor argued that the defendant terminated his interview with the police because he had done something wrong. Burke, 163 Wn.2d at 222. Thus, the State asked the jury to believe that Burke decided to terminate the interview and consult with an attorney because he was guilty. Id.

The State imputed to Burke the reasons it believed his father gave for ending the interview: a “sense” that Burke’s sexual encounter with J.S. was illegal. An analysis of imputation examines the prosecutor’s intent and whether the jury would “naturally and necessarily” take the comments as referring to the defendant’s silence. The State thus advanced the link between guilt and the termination of the interview. The implication is that suspects who invoke their right to silence do so because they know they have done something wrong. We conclude the State violated Burke’s right to silence.

Id.

In this case, the State similarly advanced a link between Thrasher’s decision not to talk to Detective Vrandenburg and his guilt. The State argued the detective was simply trying to do his job and wanted to give Mr. Thrasher the opportunity to straighten out his address. Instead, Mr. Thrasher was unreasonable and belligerent, directing the detective to his counsel instead of

answering the detective's questions. The prosecutor even suggested in closing that the reason Mr. Thrasher did not want to talk to the detective was that he knew he was in violation of the registration law. Thus, as in Burke, the prosecutor's comments violated Mr. Thrasher's constitutional right to remain silent.

The State's use of Mr. Thrasher's alleged belligerence by not answering questions and referring the detective to his lawyer is also similar to a recent Court of Appeals decision, Hager, 2009 WL 2832088. In Hager a detective testified Hager was "angry" and "evasive" during questioning, permitting the inference that he was guilty of the allegations against him. Id. at \*2, 4. "His comment that Mr. Hager was evasive was given in context of Mr. Hager's denial of the allegations against him. As such, it was injected for no other purpose than to suggest Mr. Hager's guilt." Id. at \*4. Here, too, the detective's comments that Mr. Thrasher was belligerent were made in the context of Mr. Thrasher's refusal to discuss the allegations against him with the detective. As in Hager, the comments violated Mr. Thrasher's constitutional privilege against self-incrimination and warrant a new trial. Id. at \*5-6.

d. The prosecutor's use of Mr. Thrasher's retention of counsel to imply guilt violated his constitutional right to due process. Washington courts have not addressed whether the prosecutor's use of a defendant's retention of counsel violates the defendant's constitutional rights apart from the right against self-incrimination, but a similar analysis applies. Exercising either the right to silence or the right to counsel are intertwined, and both are ambiguous actions that do not necessarily indicate guilt. Here, the prosecutor's use of Mr. Thrasher's retention of counsel violated not only his constitutional right to remain silent, but also his constitutional right to due process.

The majority of federal and state courts who have addressed the issue have found a violation of the Fourteenth Amendment right to due process of law when the State utilizes a defendant's contact with counsel as evidence of guilt. State v. Angel T., 292 Conn. 262, 278, 973 A.2d 1207, 1218 (Conn. 2009); State v. Dixon, 279 Kan. 563, 591, 112 P.3d 883, 904 (Kan. 2005). The Connecticut Supreme Court's recent opinion is instructive, as it addresses a case where the defendant retained an attorney while being investigated but before custodial interrogation or the filing of criminal charges. In Angel T., the defendant was suspected of

sexually abusing his 10-year old niece. Angel T., 973 A.2d at 1210-11. The investigating detective testified that he left a telephone message for the defendant, the message was returned by the defendant's attorney, and the two arranged an interview. Id. at 1211. The interview did not take place, however, because the attorney lost contact with his client. Id. The detective continued to place telephone calls to the defendant that were not returned. Id.

When the defendant testified in his own defense, he did not mention the police interview, but the prosecutor cross-examined him about why he did not talk to the police and whether his attorney had instructed him not to do so. Angel T., 973 A.2d at 1212. In closing argument, the prosecutor discussed the detective's investigation, described it as impartial and thorough, and argued it was not the detective's fault he did not interview the defendant. Id. at 1213-14. In discussing the defendant's credibility, the prosecutor pointed out he had the opportunity to help with the investigation and blamed the lack of an interview on others. Id. at 1214.

After reviewing cases from the federal and state courts, the Connecticut Supreme Court concluded that a prosecutor violates the Fourteenth Amendment's due process clause "when he or she elicits, and argues about, evidence tending to suggest a criminal

defendant's contact with an attorney prior to his arrest." Angel T., 973 A.2d at 1220. The court reasoned that jurors are not lawyers, and could easily draw the inference that the defendant decided to seek counsel because he was or believed himself to be guilty. Id. The court rejected the prosecutor's argument that the prosecutor was simply commenting on the police investigation as permitted by Doyle, 426 U.S. at 619. Id. at 1221-22. The Angel T. Court noted that the Doyle exception is applicable only in "limited and exceptional circumstances" where the police investigation and the defendant's statements in connection to the investigation are actually at issue. Id. at 1222. The court concluded that the defendant's due process rights were violated and remanded for a new trial. Id. at 286-95.

The Kansas Supreme Court's 2005 decision addressing the use of evidence the defendant called and met with an attorney prior to being charged also concludes the prosecutor's use of this information was unconstitutional. Dixon, 112 P.3d at 895-905. The defendant was charged with felony murder and other crimes as a result of an explosion and fire that destroyed an apartment building where his estranged girlfriend resided. Id. at 889-90. The prosecutor elicited testimony from four witnesses concerning

Dixon's telephone calls to and meeting with his attorney shortly after the explosion and weeks before he was charged and arrested, implying the contact suggested guilt.<sup>1</sup> Id. at 895. The prosecutor commented upon the timing of the defendant's contact with his lawyer, but did not directly argue it showed consciousness of guilt. Id. at 897.

Following the lead of cases from other jurisdictions, the Kansas Supreme Court held that it was improper for the prosecutor to elicit testimony and comment on Dixon's contact with counsel prior to his arrest. Dixon, 112 P.3d at 904. The court also concluded the evidence is irrelevant and inadmissible. Id.

All other courts [with the exception of Mississippi] reasoned that a prosecutor is constitutionally precluded from eliciting testimony of a defendant's contacting an attorney and commenting on it on account of the potent tendency of the evidence and comment to serve improperly as the basis of an inference of guilt. We conclude that it was improper for the prosecutor by questions and comments to draw incriminatory inferences from defendant's constitutional rights under the Fourteenth Amendment to employ counsel as an element of the right to a fair trial. We further agree with the Maryland court that such evidence of "obtention or attempted obtention of a lawyer or legal advice" is irrelevant and inadmissible.

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<sup>1</sup> The witnesses included Dixon's mother, two friends, and a state investigator who tracked his telephone calls. Dixon, 112 P.3d at 895-97.

Id. (referring to Riddley v. State, 777 So.2d 31 (Miss. 2000) and Hunter v. State, 82 Md.App. 679, 573 A.2d 85 (1990)).

Other courts have also found the State's use of a suspect's retention of counsel violated due process. Henderson v. United States, 632 A.2d 419 (D.C.App. 1993) (Fifth Amendment prohibits government from implying defendant guilty because he sought legal counsel day after wife's murder; evidence not probative of guilt); People v. Schindler, 114 Cal.App.3d 178, 170 Cal.Rptr. 461 (1980) (violation of rights to due process and silence when prosecutor rebutted defendant's claim of diminished capacity in murder of her husband by eliciting testimony defendant declined to talk to police without attorney and asked friend to try to contact specific attorney for her several hours after shooting); United States v. McDonald, 620 F.2d 559 (5<sup>th</sup> Cir. 1980) (improper for government to argue defendant's lawyer present when search warrant executed, thus suggesting lawyer knew of, condoned, or caused destruction of evidence); United States v. Williams, 556 F.2d 65 (D.C.Cir.) (violation of Fifth Amendment for detective to testify he concluded interview when defendant asked for an attorney), cert. denied, 431 U.S. 972 (1977); United States v. Liddy, 509 F.2d 428 (D.C.Cir. 1974) (approving of instruction informing jury not to draw adverse

inference from defendant's hiring attorney, disapproving of portion of instruction permitting jury to draw adverse inference from time and circumstances of retention), cert. denied, 420 U.S. 911 (1975); United States ex. rel. Macon v. Yeager, 476 F.2d 613 (3<sup>rd</sup> Cir.) (unconstitutional to introduce evidence and argue defendant saw attorney morning after shooting), cert. denied, 414 U.S. 855 (1973); State v. Roberts, 296 Minn. 347, 208 N.W.2d 744, 747 (Minn. 1973) (unconstitutional to admit irrelevant evidence that defendant asked for attorney when asked if he committed charged offense).

Mr. Thrasher was not in police custody, but he was free to refuse to answer the detective's questions and refer the detective to his attorney. Hager, 2009 WL 2832088 at \*5 (defendant under no obligation to assist State in producing evidence against him). These actions were within Mr. Thrasher's rights and not indicative of guilt. Easter, 130 Wn.2d at 238. "It is impermissible to attempt to prove a defendant's guilt by pointing ominously at the fact that he has sought the assistance of counsel." McDonald, 620 F.2d at 564. The prosecutor's use of Mr. Thrasher's decision to refer the detective to his attorney violated Mr. Thrasher's constitutional right to due process.

e. Mr. Thrasher may raise this constitutional issue on appeal. Mr. Thrasher's counsel posed only one objection when the State elicited Detective Vrandenburg's testimony that Mr. Thrasher did not want to talk about his address with the detective and asked the detective to contact his attorney. 6/19/09RP 14. Because the introduction of evidence that Mr. Thrasher exercised his rights to remain silent and to counsel and the use of the evidence to infer guilt are manifest constitutional issues, this Court should address them in this appeal.

While appellate courts do not usually review issues not first raised in the trial court, an exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). When reviewing a constitutional error raised for the first time on appeal, the appellate court must determine the error is truly of constitutional magnitude and, if it is, examine the effect the error had on the defendant's trial utilizing the harmless constitutional error standard. State v. Scott, 110 Wn.2d 682, 688, 7576 P.2d 492 (1988).

The prosecutor's improper use of the defendant's silence and request for counsel is truly a constitutional issue, as argued above. As argued below, the State cannot demonstrate the error was harmless beyond a reasonable doubt. Thus Mr. Thrasher has

raised a constitutional issue that may be raised for the first time on appeal. State v. Romero, 113 Wn.App. 779, 786, 54 P.3d 1255 (2002); State v. Curtis, 110 Wn.App. 6, 11, 37 P.3d 1274 (2002); State v. Keene, 86 Wn.App. 589, 592, 938 P.2d 839 (1997).

f. The State cannot demonstrate that the prosecutor's improper comment use of Mr. Thrasher's right to remain silent and to utilize counsel was harmless beyond a reasonable doubt. When the prosecutor uses the exercise of a constitutional right as evidence of the defendant's guilt, the constitutional harmless error standard applies. Burke, 163 Wn.2d at 222; Easter, 130 Wn.2d at 242; State v. Knapp, 148 Wn.App. 414, 421, 199 P.3d 505 (2009). This constitutional harmless error standard requires the defendant to identify the constitutional error and then places the burden on the government to prove beyond a reasonable doubt the error was not harmless. Chapman, 386 U.S. at 24; Easter, 130 Wn.2d at 242. The reviewing court must determine if the evidence is so overwhelming that the jury would have found the defendant guilty absent the constitutional error. Easter, 130 Wn.2d at 242. It includes an evaluation of the incriminating evidence in the record and also reflection upon the effect of the error on a reasonable trier of fact. United States v. Bishop, 264 F.3d 919, 927 (9<sup>th</sup> Cir. 2001).

The prosecutor's use of Mr. Thrasher's desire not to talk to an investigating police officer and his request the detective speak to his lawyer as evidence Mr. Thrasher was guilty was clearly unconstitutional. The State did produce evidence that Mr. Thrasher did not register as required. But this Court cannot conclude the evidence was so overwhelming that the jury would have returned the same verdict in light of Mr. Thrasher's defense that he was too ill to register weekly as required when homeless.

The prosecutor introduced evidence that Mr. Thrasher was "belligerent" because he declined to talk with the detective on two separate occasions and asked the detective to instead talk to his lawyer. The prosecutor then implied Mr. Thrasher did not take advantage of the opportunity to talk to the detective and became angry because Mr. Thrasher knew he was guilty of violating the registration law. This severely undermined Mr. Thrasher's credibility, and he was the only witness for the defense. Had the State not violated Mr. Thrasher's constitutional rights in this manner, the jury verdict could easily have been different. The State cannot demonstrate beyond a reasonable doubt that a rational juror might have returned a different verdict absent the improper

comment on Mr. Thrasher's exercise of his constitutional rights to silence and to retain an attorney.

The Burke Court found that evidence that the defendant terminated his conversation with police when his father suggested he consult with an attorney was not harmless error. Burke, 163 Wn.2d at 223. The court reasoned "[t]he trial boiled down to whether the jury believed or disbelieved Burke's story," and repeated references to his silence undermined his credibility as a witness. Id. Similarly here, the trial boiled down to whether the jury believed Mr. Thrasher was too ill to travel to downtown Seattle every week, and the references to his belligerent refusal to talk to the police and decision to refer the detective to his lawyer was used to undermine his credibility. Other Washington cases are in accord. Easter, 130 Wn.2d at 242-43; Knapp, 148 Wn.App. at 422-25 (comment in closing on defendant's pre-arrest silence not harmless because case turned on credibility of defendant and alibi witness); Romero, 113 Wn.App. at 794 (evidence that defendant refused to talk to arresting officers and was uncooperative not harmless where case turned on testimony of one eyewitness); Keene, 86 Wn.App. at 595 (evidence that defendant did not return detective's telephone calls and comment in closing implying indicative of guilt not

harmless in light of fairly weak evidence against defendant). This Court should reverse Mr. Thrasher's conviction and remand for a new trial. Burke, 163 Wn.2d at 223.

2. MR. THRASHER DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS

a. Mr. Thrasher had the right to effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

A lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. Strickland, 466 U.S. at 690. In reviewing the first prong of the Strickland test, the appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the

defendant demonstrates “counsel’s errors were so serious as to deprive the defendant of a fair trial.” Strickland, 466 U.S. at 687.

b. Defense counsel was ineffective for failing to offer a necessity instruction. Mr. Thrasher’s defense at trial was that he was too ill to travel to the King County Sheriff’s Office in downtown Seattle to report in person on a weekly basis. While Mr. Thrasher testified as to his medical problems, his attorney did not put his testimony in a legal perspective for the jury by offering a necessity defense. As a result, the prosecutor was able to successfully argue that Mr. Thrasher had admitted his guilt but was improperly attempting to play on the sympathy of the jury. 3/19/09RP 104-05, 111-13.

The defendant in a criminal case has the right to a correct statement of the law and to have the jury instructed on a defense that is supported by substantial evidence. Thomas, 109 Wn.2d at 228; State v. Kruger, 116 Wn.App. 685, 691, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003). To determine if defense counsel’s failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts necessarily reviews three questions: (1) was the defendant entitled to the instruction; (2) was the failure to request the instruction tactical; and

(3) did the failure to offer the instruction prejudice the defendant.

Kruger, 116 Wn.App. at 690-91.

i. *A necessity instruction would have been given if offered.* To determine if the defendant was entitled to the instruction, the court must review the entire record in the light most favorable to the defendant, keeping in mind that the jury, not the court, weighs the evidence and determines witness credibility. State v. Ginn, 128 Wn.App. 872, 879, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006).

Necessity is a common law defense that excuses otherwise criminal conduct when it is necessary to avoid a greater harm.

State v. Gallegos, 73 Wn.App. 644, 650-51, 871 P.2d 621 (1994);

Shaun P. Martin, The Radical Necessity Defense, 73 U. Cin. L.

Rev. 1527 (2005)..

The necessity defense essentially permits an accused to admit the elements of an offense but avoid punishment if her illegal acts were designed to obtain a greater good. A driver may exceed the speed limit to rush an injured person to the hospital. An onlooker is permitted to destroy a home to prevent a fire from spreading. A prisoner may leave a burning jail. A captain may enter an embargoed port in a storm.

Martin, The Radical Necessity Defense, 73 U. Cin. L. Rev. at 1727-

28. The necessity defense is a long-standing component of the

Anglo-American criminal law that has been adopted in every American jurisdiction. Id. at 1532-33, 1535-36; Laura Schulkind, Applying the Necessity Defense to Civil Disobedience Cases, 64 N.Y.U. L. Rev. 79, 83 (1989)

Washington's common law defense of necessity is included in the pattern jury instructions. 11A Washington Practice: Washington Pattern Jury Instructions Criminal, 18.02 (1998 pocket part). The pattern instruction reads:

Necessity is a defense to the charge of  (fill in appropriate offense)  if

(1) the defense reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and

(2) the harm sought to be avoided was greater than the harm resulting from a violation of the law;

(3) the threatened harm was not brought about by the defendant; and

(4) no reasonably [equally effective] legal alternative existed.

This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

Id.<sup>2</sup> Thus, the necessity defense applies when the harm the defendant sought to avoid was greater than the harm resulting from the law violation, the defendant reasonably believed his actions were necessary to avoid the greater evil, the defendant did not himself cause the threatened harm, and the defendant had no reasonable legal alternative. Id; see Martin, The Radical Necessity Defense, 73 U. Cin. L. Rev. at 1535-36.

Mr. Thrasher's case fits the requirements for a necessity defense. Mr. Thrasher reasonably believed that he was too sick to travel to downtown Seattle to register in person. The harm to his health if he had attempted the long walk and bus trip was greater than the harm of not appearing personally in downtown Seattle to register as a homeless person. Mr. Thrasher did not cause his own medical problems. And Mr. Thrasher had no reasonable alternative; he could not telephone the sheriff's office and he had no permanent address that he could report by mail.

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<sup>2</sup> A more specific statutory defense may be available for some offenses. RCW 9A.76.170(1) (uncontrollable circumstances defense to bail jumping); RCW 69.51A.040 (qualifying patient and physician exemptions to possession of marijuana); see State v. Jeffrey, 77 Wn.App. 222, 225, 889 P.2d 956 (1995) (more specific necessity instruction should be used in prosecution for unlawful possession of firearm).

ii. Mr. Thrasher's trial attorney did not offer a necessity defense because he did not thoroughly investigate the facts and law of his case. Defense counsel must, "at a minimum, conduct a reasonable investigation" in order to make informed decisions about how to best represent his client. In re Personal Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (emphasis deleted) (quoting Brett, 142 Wn.2d at 873). "This includes investigating all reasonable lines of defense." Davis, 152 Wn.2d at 721 (citing Morrison, 477 U.S. at 384). See American Bar Association, Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3<sup>rd</sup> ed. 1993).

Defense counsel is ineffective if he fails to propose an instruction that assists the jury in understanding a critical component of the defense. For example, where the defendant's intent was the focus of the defense in a prosecution for assaulting a police officer, it was ineffective assistance to fail to propose a diminished capacity instruction. Kruger, 116 Wn.App. at 693-94. Although the issue of the defendant's intoxication was before the jury, the jury was not apprised of the law and thus the defense was "impotent." Id. at 695. Similarly, where defense counsel raised a diminished capacity defense based upon intoxication in a

prosecution for felony flight, it was ineffective to fail to propose an instruction that explained the subjective elements of that offense. Thomas, 109 Wn.2d at 226-27. The Thomas Court reasoned the defendant was entitled to jury instructions that correctly state the law and “a reasonably competent attorney would have been sufficiently aware of the relevant legal principles to enable him or her to propose an instruction based on pertinent cases.” Id. at 229.

Here, too, a reasonably competent attorney would have been sufficiently aware of the common law necessity defense to enable him to propose a necessity defense instruction, readily available in the Washington Pattern Instructions. Mr. Thrasher’s inability to report in person due to his health problems was central to his defense and argued by counsel in closing argument.

3/19/09RP 107-11. Reasonably effective counsel would have proposed a necessity instruction.

iii. Mr. Thrasher was prejudiced by the failure of his attorney to propose a necessity instruction. Mr. Thrasher was entitled to a necessity instruction, as he admitted he was unable to report in person to the sheriff’s department due to illness and poverty. Had the jury had been instructed on necessity, it could have concluded by a preponderance of the evidence that Mr.

Thrasher's actions fit that defense because (1) Mr. Thrasher was prevented by illness and lack of money from reporting as required, (2), it would have been a greater social harm if Mr. Thrasher had made his medical problems worse or even died trying to report to the sheriff in person, and (3) Mr. Thrasher did not create his own illness, and (4) no reasonable alternatives existed.

The jury did not have the opportunity to determine if Mr. Thrasher's failure to report was excused by necessity because they were not provided with instructions on the defense. Although defense counsel argued Mr. Thrasher's actions were excusable due to his ill health, homelessness and poverty, he had no legal basis to argue his client should therefore be found not guilty. "The jury, without the instruction, was not correctly apprised of the law, and defendants' attorneys were unable to effectively argue their theory." Kruger, 116 Wn.App. at 694-95 (quoting State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)). As in Kruger, Mr. Thrasher's "defense was impotent." 116 Wn.App. at 695.

c. Mr. Thrasher's conviction must be reversed. Mr. Thrasher did not receive a fair trial because his attorney did not understand his defense or propose an instruction that permitted the jury to consider it. This Court should reverse his conviction and

remand for a new trial. Thomas, 109 Wn.2d at 229, 232; Kruger, 116 Wn.App. at 695.

3. THE CUMULATIVE EFFECT OF THE ABOVE  
ERRORS DENIED MR. THRASHER A FAIR TRIAL

The due process clauses of the federal and state constitutions guarantee that a criminal defendant receive a fair trial. U.S. Const. amend. XIV; Const. art. 1, § 3, 22. Reversal may be required if a trial is not fair due to the cumulative effects of various trial court errors, even if each error examined on its own might otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Thus, in State v. Alexander, this Court ordered a new trial because (1) a counselor impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony at trial and in closing. State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992). And in Coe, the court reversed four rape convictions based upon numerous evidentiary errors and a violation of discovery rules by the prosecutor. Coe, 101 Wn.2d at 774-86, 788-89.

If this Court concludes neither of the two errors above require reversal of Mr. Thrasher's conviction, it should decide that the combination of the errors requires a new trial. Cumulatively, the above errors cannot be deemed harmless since the State used his exercise of his constitutional rights to silence and to counsel as substantive evidence of Mr. Thrasher's guilt and Mr. Thrasher's attorney did not present his defense. Thus, not only was Mr. Thrasher's credibility undermined, the jury had no legal way to consider his defense during their deliberations. This Court cannot be convinced beyond a reasonable doubt the combined errors did not affect the jury verdict. Mr. Thrasher's conviction must be reversed and remanded for a new trial.

E. CONCLUSION

The State violated Michael Thrasher's constitutional right to remain silent and to counsel by eliciting testimony that he did not want to talk to a police detective and referred the detective to his lawyer and then arguing Mr. Thrasher was belligerent and uncooperative with the detective because he was guilty. In addition, Mr. Thrasher did not receive the effective assistance of counsel guaranteed by the federal and state constitutions because his attorney did not request a necessity instruction despite Mr.

Thrasher's defense that he was too ill to comply with the reporting requirements. In the alternative, Mr. Thrasher's constitutional right to a fair trial was violated by the combination of these two errors.

Mr. Thrasher's conviction for failing to register as a sex offender must be reversed and the case remanded for a new trial.

DATED this 9<sup>th</sup> day of October 2009.

Respectfully submitted,



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Washington Appellate Project (91052)  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63334-1-I
v.	)	
	)	
MICHAEL THRASHER,	)	
	)	
Appellant.	)	

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COURT OF APPEALS  
STATE OF WASHINGTON  
2009 OCT -9 PM 4:19

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF OCTOBER, 2009, 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:

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| APPELLATE UNIT   | ( ) | HAND DELIVERY |
| KING COUNTY COURTHOUSE   | ( ) | _____         |
| 516 THIRD AVENUE, W-554  |     |               |
| SEATTLE, WA 98104  |     |               |
| <br>   |     |               |
| <input checked="" type="checkbox"/> MICHAEL THRASHER                 | (X) | U.S. MAIL     |
| 978000   | ( ) | HAND DELIVERY |
| WASHINGTON STATE PENITENTIARY  | ( ) | _____         |
| 1313 N 13 <sup>TH</sup> AVE  |     |               |
| WALLA WALLA, WA 99362  |     |               |

**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF OCTOBER, 2009.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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