

NO. 63413-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

PAUL A. McVAY,

Appellant.

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BRIEF OF RESPONDENT

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*[Handwritten Signature]*

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## **I. ISSUES**

1. Is the defendant entitled to a new trial on one of seven counts he was convicted of the basis of ineffective assistance of counsel for counsel's failure to request a lesser included instruction?

2. Was the defendant deprived of a unanimous jury verdict on one count of the Information?

## **II. STATEMENT OF THE CASE**

On November 8, 2008 the defendant entered the Washington Mutual Bank branch located at Murphy's Corner and tried to deposit a check drawn on the account of Sang Hwang. The assistant manager, Kristen Mack, assisted the defendant with his transaction. Ms. Mack noticed some discrepancies with the form of the check. She advised the defendant that she was going to call the account holder about it because the check did not look real. When she returned to her teller station after making the call the defendant had left the bank. Mr. Hwang verified that the check was not his check, it did not contain his signature, he did not know the defendant, and he did not give anyone including the defendant permission to have his name or account number. 2 RP 210-213, 236-37.

On November 20, 2008 the defendant was in the communications department at Wall Mart in Everett purchasing a cell phone. In connection with the purchase sales associate Donald Schulumbaum asked the defendant for identification. Mr. Schulumbaum noticed a number of things about the identification which suggested to him the identification was fake, so he contacted store security officer Stacy Wright. 1 RP 62-66.

As Mr. Wright was investigating the identification card in his office, Officer Atkins, from the Everett Police Department, came by. Officer Atkins and Mr. Wright then confronted the defendant and told him there was something wrong with the identification. The defendant looked like he was going to run away, so the officer detained the defendant with his taser. When asked the defendant gave Officer Atkins his real name and real identification. 1 RP 73-83.

The defendant was escorted to the security office where he was searched incident to arrest. Police seized a folder the defendant was carrying. Inside the folder they found numerous checks with the names of different banks and different account holders on them. 1 RP 84-85, 96.

One check contained the name and account number for Receivables Performance Management. Jennifer Hansen, the finance director for that company, did not issue the check. The original check had been issued to a former employee named Paul Hutton. Mr. Hutton was personally acquainted with the defendant. On one occasion the defendant asked Mr. Hutton for a copy of Mr. Hutton's paycheck so he and another person could make copies of it in order to obtain cash or phone cards. Mr. Hutton refused the request. Neither Mr. Hutton nor anyone from Receivables Performance Management had given the defendant permission to possess the name or account number for that company. 1 RP 111-112; 2 RP 144-146, 148, 230-232.

Eleven of the checks found in the defendant's folder named the account holder as Five Horizons Espresso. The check contained the account number for Five Horizons Espresso and an address that was very similar to the address of the partners in that business. The defendant did not have permission to possess the name or checking account number for that business. 2 RP 124-125, 152-153.

The defendant was charged with five counts of second degree identity theft, (counts I, II, V, VI, and VII), two counts of

forgery (counts III, and IV), and two counts of unlawful possession of fictitious identification (counts VIII and IX). 1 CP 130-131. The court dismissed counts VIII and IX after the State presented its case. 2 RP 272. The defendant was convicted of the remaining counts. 1 CP 33, 89-95.

### **III. ARGUMENT**

#### **A. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL ON COUNT VI ON THE BASIS HIS COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.**

The defendant argues he received ineffective assistance of counsel with respect to count VI, involving the Horizon Espresso checks, because counsel did not request an instruction on second degree possession of stolen property as a lesser included offense. In order to establish a claim for relief on this basis the defendant must establish that “(1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstance; and (2) defense counsel’s de ficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The defendant must satisfy his burden of proof on

both prongs in order to be entitled to relief on the basis that he received ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Courts employ a strong presumption that counsel provided effective representation. State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001). A claim that counsel's failure to request a given instruction constituted ineffective assistance of counsel is considered on a case by case basis. State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001).

**1. The Defendant Was Not Prejudiced When Counsel Did Not Request A Lesser Included Jury Instruction.**

**a. The Defendant's Sentence Would Not Have Changed Had The Jury Been Instructed On Second Degree Possession Of Stolen Property.**

The defendant does not address the prejudice prong of the analysis except to note in a footnote that second degree possession of stolen property has a lower seriousness level than second degree identity theft, and thus would have faced a shorter standard sentencing range had he been convicted of the possession of stolen property charge. BOA at 4, n. 2. Under the facts of this case that difference does not establish the requisite prejudice to be entitled to relief.

The defendant does not challenge his convictions for the other six counts in which the jury found he was guilty.<sup>1</sup> In addition to count VI the defendant was convicted of four additional counts of second degree identity theft. The court calculated the defendant's offender score at 13 for each count. 1 CP 21. The defendant does not contend that he would have been completely acquitted of that count had the court given the lesser included offense. Thus regardless of what his standard range would have been on count VI the defendant would still have faced a standard range of 43 to 57 months on counts I, II, V, and VII. Even if the court had given the instruction the defendant contends he was entitled to on count VI, the results of the proceeding would not have been different.

This holds true even if the defendant could persuasively argue he would have been entitled to an acquittal on that count. Each current and prior conviction counts as one point.<sup>2</sup> Had the defendant been acquitted of count VI his score would have been reduced to 12. While his score would have been affected his standard range would not have been. He would still have faced 43 to 57 months confinement on the other four identity theft counts.

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<sup>1</sup> The defendant states in a footnote that only count VI is the subject of his appeal. BOA at 2, n. 1

Because all counts run concurrently the total amount of confinement he faced would not have changed. Thus the defendant has failed to establish the necessary prejudice in order to be entitled to relief.

**b. If Counsel Had Proposed A Lesser Included Instruction It Would Have Properly Been Rejected.**

The defendant was not prejudiced for a second reason. Absent an affirmative showing that the act which defendant alleges counsel should have taken would have produced the desired result there is no showing the defendant was actually prejudiced. McFarland, 127 Wn.2d at 337, n. 4. Here a proposed instruction that second degree possession of stolen property was a lesser included instruction for second degree identity theft would likely have been rejected.

A party is entitled to an instruction on a lesser included offense when (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence in the case supports an inference that the lesser crime was committed (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 548 P.2d 382 (1978). In other words "if it is possible to

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<sup>2</sup> A copy of the score sheets for second degree identity theft is attached as Appendix A to this brief.

commit the greater offense without having committed the lesser offense, the latter is not an included crime.” State v. Frazier, 99 Wn.2d 180, 191, 66 P.2d 126 (1983) quoting, State v. Roybal, 82 Wn.2d 577, 583, 512 P.2d 126 (1983). The rationale for the rule is that a party may have instructions embodying its theory of the case if there is affirmative evidence to support it. State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

The defendant argues that possession of stolen property second degree under the access device means of committing the crime meets the legal prong of the Workman test because an access device meets the definition of financial information in second degree identity theft. That argument ignores the other elements of second degree possession of stolen property.

The elements of second degree possession of stolen property under the theory advanced by the defendant includes (1) possession of stolen property, (2) with knowledge that the property had been stolen, and (3) the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto, and the stolen property is an access device. RCW 9A.56.140(1), RCW 9A.56.160(1)(c). The elements of second degree identity theft do not require that the financial information

was stolen, or that the defendant acted to withhold or appropriate the property to the use of someone other than the person entitled to that financial information. A party may be guilty of identity theft even though the true owner of the financial information in question continues to be used and possessed by the true owner. Thus the legal prong is not satisfied. A request for an instruction on second degree possession of stolen property would have been rejected.

The request would have been properly rejected under the factual prong in this case as well. In order to meet the factual requirement some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before the instruction will be given. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), disapproved on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

The evidence here showed that when the defendant was arrested he was in possession of a folder which contained a number of checks with different names and banks on them. 11 of those checks were drawn on the Bank of America. Two listed the account holder as Five Horizens Espresso and Bruce Eagleton. Nine listed the account holder as Five Horizens Espresso and Samuel S. Scharde. The 11 checks contained the bank routing

number and account number for Five Horizons Espresso, and a partial address for one of the partners in the business. No one, including the defendant had permission to possess or use the business account number and misspelled name. 1 RP 84; 2 RP 124-125, 152-153. Ex. 11.

There was no evidence how the defendant obtained the business's name or account number. There was no evidence that the account number was withheld from the business owners. The evidence produce did not affirmatively prove that the defendant knowingly possessed stolen property and in doing so withheld or appropriated it to the use of someone other than Ms. Greene or her partners.

**c. The Verdict Would Not Have Been Different.**

When assessing the prejudice prong of any ineffective assistance of counsel claim the Court presumes the jury followed the law as it was given to them. Strickland, 466 U.S. at 694-95. The jury here found the evidence was sufficient to find the defendant guilty of the charge in count VI beyond a reasonable doubt.

Had the jury been instructed on second degree possession of stolen property as a lesser included offense the court would have

given the instruction on lesser included offenses, WPIC 155.00. Pursuant to that instruction the jury would consider the greater charged offense first. If they unanimously agreed on a verdict of guilty they would not go on to discuss the lesser offense. Since the jury unanimously found the defendant guilty of identity theft, they would not have proceeded to discuss second degree possession of stolen property as the lesser included offense. Thus the defendant has failed to establish a reasonable probability that the results of the proceeding would have been different had counsel proposed second degree possession of stolen property as a lesser included offense, even if the court had given that instruction.

## **2. Counsel's Performance At Trial Was Not Deficient.**

When considering the performance prong of an ineffective assistance of counsel claim the inquiry is whether counsel's assistance was reasonable considering all of the circumstances. Strickland, 466 U.S. at 688, 104 S.Ct. at 2065. Thus the Court's review of counsel's performance is highly deferential. Id.

A legitimate trial strategy cannot be the basis for an ineffective assistance of counsel claim. State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). The main thrust of defense counsel's strategy as to count VI was to challenge the sufficiency of the

evidence that the business constituted a “person” under the statute. 2 RP 238-242, 301-305. Although this strategy did not produce an acquittal, that result does not establish that counsel was ineffective. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) (“defendant is not guaranteed ‘successful assistance of counsel’” quoting, State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

The defendant takes issue with this strategy complaining that it was not so compelling to justify an “all or nothing” strategy. In order to support his argument the defendant relies on State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006) and State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009). Grier outlined the “rare circumstances” in which failure to request a jury instruction may constitute constitutionally deficient performance. First the defendant must demonstrate that he was entitled to a lesser included instruction under both the factual and legal prongs of the Workman test. Then he must show that under the facts of his case it was an objectively unreasonable tactical decision for defense counsel to force the jury to find either that the greater offense occurred or that no offense occurred. Grier, 150 Wn.2d at 635. In both Grier and Pittman the legal prong was met and there was

comparatively more evidence produced that the lesser offense occurred and not the greater offense.

Unlike either Grier or Pittman, as demonstrated above, the proposed lesser instruction did not meet either the legal or factual prongs of the Workman test. Counsel is not ineffective for not proposing an instruction that is not supported by the evidence. State v. King, 24 Wn. App. 495, 501-502, 601 P.2d 982 (1979). Thus, neither Grier nor Pittman supports the defendant's argument. Counsel did not provide deficient performance for not pursuing a strategy that would not have worked.

#### **B. THE DEFENDANT'S RIGHT TO JURY UNANIMITY WAS RESPECTED.**

The defendant asserts that he was denied a unanimous jury verdict because possession of financial information and possession of a means of identification are alternative means of committing identity theft, the evidence only supported one means, and there was no special verdict form indicating the jury only relied on the means supported by the evidence. <sup>3</sup>

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<sup>3</sup> Whether there are alternative means of committing identity theft does not appear to have been decided by the Court. Most alternative means statutes set out the alternatives in separate paragraphs. Examples are first degree murder, RCW 9A.32.030 (Fortune, supra), witness tampering, RCW 9A.72.120 (State v. Lobe, 140 Wn App. 897, 167 P.3d 627 (2007)), first degree rape, RCW 9A.44.040(1) (State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987)). However Courts have found some statutes contain alternative means to

The defendant's right to jury unanimity was satisfied even if the Court determines the phrases "means of identification" and "financial information" creates alternative means for committing the crime of identity theft. If there is sufficient evidence to support each of the alternative means of a charged crime then jurors can give a general verdict on that crime without giving express unanimity on which alternative means the defendant used to commit the crime. State v. Fortune, 128 Wn.2d 464, 467, 909 P.2d 930 (1996). Sufficient evidence exists if "after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Ortega-Martinez, 124 Wn.2d 702, 708, 88 P.2d 231 (1994) quoting, State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

The defendant argues there was insufficient evidence to prove the defendant possessed a means of identification for Horizon Espresso because it did not contain the correct name or address for the business. BOA at 13.

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committing the crime even where those statutes do not set out the alternatives in subparagraphs. An example is second degree burglary, RCW 9A.52.030 (State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005)). The State does not concede that the identity theft statute creates alternative means of committing the crime, but accepts that premise for the sake of argument.

The definition for means of identification includes a “means of information” that is identifiable with “an individual or other person.” RCW 9.35.005(3). The statute includes as examples a current name of the person or identifier of the individual “and other information that could be used to identify the person. Id. The list of examples is non-exclusive. State v. Hall, 112 Wn. App. 164, 169, 48 P.3d 350 (2002) (“the statute’s use of the term ‘includes,’ denotes a non-exclusive exemplary listing.”)

The name for the business contained a misspelling; Five Horizons Espresso vs. Five Horizens Espresso. It also contained a partial address for one of the business partners. 2 RP 151-152. Despite these minor discrepancies there was enough evidence for a rational trier of fact to find the defendant possessed a means of identification for Horizon Espresso.

In other contexts minor misspellings did not affect the validity of documents in question for the purpose of identifying the true person named in those documents. Under the doctrine of *idem sonans* absolute accuracy in spelling names is not required in legal documents if the name as spelled when pronounced according to the commonly accepted methods, and sounds practically identical

with the correct name as commonly pronounced. Kelly v. Kuhnhausen, 51 Wash. 193, 194, 98 P. 603 (1908).

In applying the doctrine of idem sonans the Court found a minor misspelling did not invalidate a lien that had been filed with the Department of Licensing in In re Esparza, 118 Wn.2d 251, 259-60, 821 P.2d 1216 (1992). Similarly the doctrine did not invalidate a judgment lien where the debtors name was spelled Pederson rather than Pedersen. Wilson Sporting Goods Co. v. Pedersen, 76 Wn. App. 300, 307, 865 P.2d 203 (1994). The Court has likewise upheld the validity of criminal Information when it contained minor misspellings of either the defendant or victim's name, but which did not affect the pronunciation of that name. State v. Johnson, 36 Wash. 294, 295-96, 78 P. 903 (1904), State v. Flett, 98 Wn. App. 799, 803, 992 P.2d 1028, review denied, 141 Wn.2d 1002, 10 P.3d 404 (2000). In each of these cases the name employed on the document was sufficient to identify the actual person at issue.

Here the discrepancy in the spelling for Five Horizons Espresso did not change how the name of the business was pronounced. Like the documents at issue in Esparza, Pedersen, Johnson, and Flett the difference of two letters did not prevent

someone from recognizing the name as identifiable with the victim business.

In addition to the name used, other information on the checks tied the name on the check with the business, making it identifiable as the real Five Horizons Espresso business. The jury had been instructed that in order to decide whether any proposition had been proven the jury was required to consider all of the evidence that the court admitted as it related to the proposition. 1 CP 98. The evidence showed the account number for Five Horizons Espresso was also on the checks. A rational trier of fact could find that on where a business name and account number appear on a single document like a check, that the name on the check identifies the account holder for that particular check, regardless of whether there are minor discrepancies in the spelling of the account holder.

Thus, there was sufficient evidence to prove that the defendant had a "means of identification" for Five Horizons Espresso. The defendant does not contend the evidence was insufficient to find the defendant guilty of possessing Five Horizons Espresso's financial information. He were therefore not denied the right to a unanimous jury on count VI.

**1. Even If There Was An Error In The Jury Instructions It Was Harmless.**

The failure to provide a unanimity instruction is harmless where under the evidence the Court can be satisfied that the jury relied on the means supported by the evidence in order to convict the defendant. State v. Bonds, 98 Wn.2d 1, 18, 653 P.2d 1024 (1982), cert denied, 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 112 (1983), State v. Martin, 69 Wn. App. 686, 689, 849 P.2d 1289 (1993). In Allen this Court considered whether the defendant was denied his right to a unanimous jury verdict on a second degree burglary charge when the jury was instructed that the State must prove unlawful entry or remaining. This Court found no prejudice to the defendant even if unlawful remaining was confined to situations where the original entry was lawful because “no rational juror could rely on the unlawful remaining means without necessarily also finding that the entry was unlawful.” Allen, 127 Wn. App. at 135.

Here the jury was instructed in part that in order to find the defendant guilty of count VI it must find beyond a reasonable doubt “that on or about the 20<sup>th</sup> of November, 2008, the defendant knowingly, obtained, possessed, or transferred a means of identification or financial information of another person, to-wit: Five

Horizons Espresso...” 1 CP 122. The defendant does not argue the evidence did not show that he possessed a piece of financial information for the victim business. Because the jury could rely on the account number to ensure that the misspelled business was actually name of Five Horizons Espresso and not some other business, it would necessarily have found the defendant possessed financial information when it found he possessed the business’s means of identification. Thus, the Court can be assured that the jury was at least unanimous that the defendant possessed financial information for that victim business.

#### **IV. CONCLUSION**

For the forgoing reasons the State asks the Court to affirm the defendant’s conviction on Count VI.

Respectfully submitted on February 23, 2010.

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## IDENTITY THEFT, SECOND DEGREE

(RCW 9.35.020(2))

CLASS C - NONVIOLENT

*CRIME AGAINST A PERSON (RCW 9.94A.411(2))*

### I. OFFENDER SCORING (RCW 9.94A.525(7))

**ADULT HISTORY:**

Enter number of felony convictions..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of serious violent and violent felony dispositions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

Enter number of nonviolent felony dispositions ..... \_\_\_\_\_ x ½ = \_\_\_\_\_

**OTHER CURRENT OFFENSES:** (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**STATUS:** Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score**  
(Round down to the nearest whole number)

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### II. SENTENCE RANGE

<b>A. OFFENDER SCORE:</b>	0	1	2	3	4	5	6	7	8	9 or more
<b>STANDARD RANGE (LEVEL II)</b>	0 - 90 days	2 - 6 months	3 - 9 months	4 - 12 months	12+ - 14 months	14 - 18 months	17 - 22 months	22 - 29 months	33 - 43 months	43 - 57 months

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.595).
- C. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-8 or III-9 to calculate the enhanced sentence.
- D. If a sentence is one year or less: community custody *may* be ordered for up to one year (See RCW 9.94A.545 for applicable situations).
- E. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 9 to 18 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).
- F. For a finding that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, see page III-10, Sexual Motivation Enhancement – Form C.
- G. If the current offense was a gang-related felony and the court found the offender involved a minor in the commission of the offense by threat or by compensation (RCW 9.94A.833), the standard sentencing range for the current offense is multiplied by 125%. See RCW 9.94A.533(10).
  - *Statutory maximum sentence is 60 months (5 years) (RCW 9A.20.021(1))*

### III. SENTENCING OPTIONS

- I. First-Time Offender Wavier; for eligibility and sentencing rules see RCW 9.94A.650
- II. Alternative to Total Confinement; for eligibility and rules see RCW 9.94A.680.
- III. Work Ethic Camp; for eligibility and sentencing rules see RCW 9.94A.690.
- IV. Drug Offender Sentencing Alternative; for eligibility and sentencing rules see RCW 9.94A.660.

*Although the Washington Sentencing Guidelines Commission does all that it can to assure the accuracy of its publications, the scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Sentencing Guidelines Commission*



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February 23, 2010

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COURT OF APPEALS  
STATE OF WASHINGTON  
2010 FEB 24 AM 10:26

**Re: STATE v. PAUL A. McVAY  
COURT OF APPEALS NO. 63413-5-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

KATHLEEN WEBBER, #16040  
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch  
Appellant's attorney

... properly stamped envelope  
... the attorney for the defendant that  
... a copy of this document.  
... under penalty of perjury under the laws of the  
... that this is true.

23 Feb 2010

Administration  
Bob Lenz, Operations Manager  
Admin East 7<sup>th</sup> Floor  
(425) 388-3333  
Fax (425) 388-7172

Civil Division  
Jason Cummings, Chief Deputy  
Admin East 7<sup>th</sup> Floor  
(425) 388-6330  
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Family Support Division  
Marie Turk, Chief Deputy  
Admin East 6<sup>th</sup> Floor  
(425) 388-7280  
Fax (425) 388-7295

2010 FEB 24 AM 10:26

COURT OF APPEALS  
STATE OF WASHINGTON  
FILED

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

THE STATE OF WASHINGTON,

Respondent,

v.

PAUL A. McVAY,

Appellant.

No. 63413-5-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 23<sup>rd</sup> day of February, 2010, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH  
1908 EAST MADISON STREET  
SEATTLE, WA 98122

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

BRIEF OF RESPONDENT

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

Signed at the Snohomish County Prosecutor's Office this 23<sup>rd</sup> day of February, 2010.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit