

66728-9

66728-9

NO. 66728-9-1

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

STATE OF WASHINGTON.

Respondent,

v.

VENITA CHANDRA,

Appellant.

REC'D  
JUN 29 2011  
King County Prosecutor  
Appellate Unit

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

The Honorable Richard Eadie, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied her constitutional right to be present at all critical stages of trial.

2. The court erred in refusing to instruct the jury on voluntary intoxication.

Issues Pertaining to Assignments of Error

1. Voir dire is a critical stage of trial and appellant had a constitutional right to attend and participate. Where appellant was not present during voir dire and the record does not show she knowingly and intelligently waived her right to be present or that she was consulted in any way, were appellant's due process rights violated?

2. Appellant was charged with assaulting a police officer. Part of her defense was that she was too intoxicated to have formed the intent to commit the offense. Where the evidence showed appellant was intoxicated and it effected her ability to form the required intent, did the court's failure to instruct the jury on voluntary intoxication deny appellant the right to present her defense and render the verdict unreliable?

B. STATEMENT OF THE CASE

1. Procedural Facts

Venita Chandra was charged in King County Superior Court with third degree assault. CP 1-4. It was alleged she assaulted a law enforcement officer who was performing his official duties at the time. Id.

A jury convicted Chandra as charged. CP 19. Chandra, who has an offender score of 0, was sentenced within the standard range to two months. CP 48-44.

2. Substantive Facts

On the evening of June 11, 2010, at about 11:00 p.m., Chandra, her brother Aneet Chandra<sup>1</sup>, and friends Monica Beltran, Anthony Abella, Justin Tao and Ramsay Van went to the Club Aura in downtown Seattle to celebrate a birthday. RP 272, 284, 401. They rode in two separate cars. RP 284. One car was Van's red Honda Civic. RP 275.

When the club closed at 2:00 a.m., and the group was leaving, Tao grabbed a woman who was with another group also at the club. RP 281. A verbal altercation ensued between members of the woman's group and Tao. RP 281. Abella, who was not drinking because he was the designated driver of Van's car, escorted Tao away from the group and put

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<sup>1</sup> To avoid confusion Aneet Chandra will be referred to by his first name.

him in the back seat of Van's car. RP 275, 294, 295. He was worried that if he did not remove Tao from the scene there would be a fight. RP 295.

At about the same time Seattle Police Officer Travis Loyd was driving through the area. A man flagged him down, pointed and told him that a person had grabbed a woman. RP 170. There was a crowd so Loyd activated his emergency lights and siren to get the crowd's attention and then he got out of his car and went over to Van's car, where the man had pointed, to investigate. RP 173. Aneet, Abella and Van were standing by the car. RP 276, 295, 297.

Loyd then saw Chandra and Beltran walking across the street towards him. It appeared Beltran was holding Chandra back but she kept coming. Loyd determined she was coming at someone who was standing behind him. RP 184, 192.

Loyd said he asked Chandra to stop but she did not. Id. Loyd heard Chandra say, "what are you going to do?" and she started to "push" through Loyd to get to the person standing behind him. RP 184-185, 199. It was as if Loyd was not standing there. RP 193. The person behind Loyd was Aneet, Chandra's brother. RP 247, 248.

As soon as Chandra came in contact with Loyd, he pushed her up against Van's car and held her there with his arm. RP 185. Loyd heard someone from behind him say "get your hands off my sister." RP187.

Loyd said as he turned to look, Chandra hit him on the left side of his face. Id. Loyd turned back to Chandra and punched her then put her in a headlock in an attempt to get her to the ground so he could put handcuffs on her. RP 187-188. Someone, however, was holding on to Chandra and told Loyd he could not take her. A crowd had gathered and Loyd told the crowd “man I am going to knock all of you out.” RP 189-190. Other officers arrived and Chandra was subdued.

Loyd’s patrol car was equipped with a camera that recorded some of the events. RP 168-169; Ex. 2. Given the position of the patrol car, the altercation between Loyd and Chandra was not picked up by the camera. RP 248.

Chandra, a nursing student, testified she started arguing with Aneet because he was with Tao and Tao caused an altercation by grabbing a woman as everyone was leaving the club. RP 413. Chandra admitted she was so drunk that she was not in her right mind. Beltran grabbed Chandra in an attempt to take her from the scene but Chandra pushed Beltran and threw her purse at Beltran. RP 414-415. Chandra then charged at Aneet asking him “what are you going to do?” As she approached Aneet, Chandra felt someone grab her from behind and she tried to push the person off her when she started to fall. Aneet held on to her. RP 416-417. The person who grabbed her was Loyd, although she did not know that at

the time. RP 417. Loyd then started pulling Chandra to the ground by her hair. When she was on the ground Loyd hit her in the face and kned her. RP 418. Chandra denied hitting Loyd.

Beltran confirmed she was dragging Chandra away from the crowd that formed after Tao grabbed the woman. RP 398. At the same time Chandra was arguing with Aneet and started walking toward him. RP 397, 406. Beltran grabbed Chandra and Chandra threw her purse at Beltran. RP 397-398. Beltran bent to get the purse and when she looked up she saw Loyd had his hand around Chandra's neck. He then took a swing at Chandra. RP 398-399. Beltran screamed that Chandra and Aneet were brother and sister and told Loyd to let them go. RP 405.

Aneet too saw Beltran pulling Chandra while he and Chandra were arguing. RP 329-330. As Chandra approached. Loyd put her in a headlock and pulled her hair. RP 330. Aneet tried to pull Chandra away from Loyd when Loyd said he was going to knock everyone out. RP 331. He saw Loyd strike at Chandra. RP 332.

After Abella got Tao into Van's car he stood outside the car with Aneet. RP 295, 297. Abella also saw and heard Aneet and Chandra, who had just met that night, arguing. Abella said Aneet was trying to calm Chandra down but she came towards him. Loyd then grabbed Chandra's hair from behind and started pulling her away from Aneet even though

people were telling Loyd to clam down and that Chandra and Aneet were brother and sister. RP 297, 302-304. Once Chandra was on the ground Abella saw Loyd moving is arm in an up and down motion. RP 306. Van too saw Chandra walk towards Aneet when Loyd came up behind and wrestled with her. RP 370.

C. ARGUMENTS

1. CHANDRA'S ABSENCE FROM JURY VOIR DIRE VIOLATED HER RIGHTS UNDER THE FOURTEENTH AMENDMENT AND ARTICLE 1, § 22.

On November 29, 2010, trial started with the Court hearing and deciding pretrial motions. Jury selection began the next morning, November 30<sup>th</sup>. Prior to selecting the jury, the State informed the court that Chandra had apparently waived her presence for the morning proceedings. RP 49. The State told the court that if the jury selection concluded that morning and testimony began that afternoon and Chandra was still not present it wanted to admit her booking photo because it would be impossible for its witnesses to make an in-court identification. RP 50. Defense counsel affirmed that Chandra would be there by noon or 12:30, after voir dire concluded. RP 50-51.

Jury selection began and it was completed during the morning session. RP 52-64, 130-137. The State began presenting its case that

afternoon with opening statements. RP 137-155. By the time it presented its first witness, Loyd, Chandra was present. RP 179-180.

Chandra was not present during the jury selection process. In State v. Irby, 170 Wn.2d 874, 885, 246 P.3d 796 (2011), the Supreme Court of Washington recently held that both the Fourteenth Amendment and article 1, § 22 guarantee every defendant the right to be present during the jury selection process.<sup>2</sup> Whether Chandra's constitutional right to be present during jury selection was violated is reviewed de novo. Id. at 880.

The Irby Court held Irby's right to be present during jury selection was violated and the Court reversed his conviction. Irby, 170 Wn.2d at 887. Irby was charged with burglary and murder. He was not present when, through an e-mail exchange, his attorney, the prosecutor, and the trial judge agreed to release six jurors for perceived hardship and one additional juror whose parent had been murdered. Id. at 877-78. The Irby Court ruled that Irby's absence from this process violated his federal and state constitutional rights to be present at trial. Id. at 877.

The Irby Court noted that under the due process Clause of the Fourteenth Amendment, jury selection is a critical stage of trial, and a defendant's right to attend attaches at least from the time when the work of empanelling the jury begins. Irby, 170 Wn.2d at 883-84 (quoting

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<sup>2</sup> Irby was decided about two months after voir dire in this case.

Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)). In Irby's case, the work of empanelling the jury had already begun when the jurors were released because they had previously been sworn in Irby's case and already filled out questionnaires. Id. at 884. That jurors were specifically evaluated for service in Irby's case as opposed to a general evaluation for service in any case distinguished the situation from those where other courts had found no right to attend. Id. at 882.

The Supreme Court also found a violation under article 1, § 22 of the Washington Constitution, which guarantees a defendant's right to appear and defend at every stage of the trial when his substantial rights may be affected. Irby, 170 Wn.2d at 884-85 (quoting State v. Shutzler, 82 Wn. 365, 367, 144 P. 284 (1914)). The Court reasoned, "Jury selection is unquestionably a stage of trial at which a defendant's substantial rights may be affected, and for that reason we do not hesitate in holding that Irby's absence from a portion of jury selection violated his right to appear and defend in person under article I, section 22 as well as the due process clause of the Fourteenth Amendment." Id. at 885. (footnote omitted). The Court noted that a defendant's rights under the state provision are arguably broader than federal rights because, unlike the federal Constitution, the right to be present under article 1, § 22 does not turn on what a defendant

might do or gain by attending . . . or the extent to which the defendant's presence may have aided his defense . . . but rather on the chance that a defendant's substantial rights may be affected at that stage of trial. Id. at 885 n.6 (citations omitted).

The Irby Court held where there is a violation of the constitutional right to be present during jury selection it is the State's burden to show the violation was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 886. In Irby, the State could not meet its burden because three of the jurors released for hardship during the email exchange fell within the range of jurors ultimately selected to serve and their alleged inability to serve was never tested by questioning in Irby's presence. Id. Because questioning at Irby's behest and in his presence may have revealed that one or more of these jurors could have made arrangements to serve, a new trial was required. Id. at 887.

Jury selection is the primary means to enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability. Gomez, 490 U.S. 858 at 873 (citations omitted). The defendant's presence is substantially related to the defense and allows the defendant to give advice or suggestion or even to supersede his lawyers. State v. Wilson, 141 Wn.App. 597, 604, 171 P.3d 501 (2007).

Here, Chandra was not present during the jury selection process. Because she was not present during the jury selection process, she had no opportunity to give counsel advice or suggestions. United States v. Gordon, 829 F.2d 119, 124 (1987). Even more so than in Irby, where Irby was absent from the email exchanges that released only six jurors on hardship grounds that if subjected to “questioning in Irby's presence as planned, the questioning might have revealed that one or more of these potential jurors were not prevented by reasons of hardship from participating on Irby's jury” (Irby, 170 Wn.2d at 886), Chandra's absence effected her substantial right to be part of the process when the jury that decided her fate was selected without her participation. See, Irby, 170 Wn.2d at 887 (Court held that jury selection is a stage of the trial at which a defendant's substantial rights to defend and appear in person may be affected). The State cannot show Chandra's absence from the jury selection process was harmless beyond a reasonable doubt.

The State will likely argue that Chandra waived her right to be present for jury selection, which makes this case different than Irby. The record does not show Chandra knowingly or intelligently waived her right to be present during the jury selection process.

Any waiver of a constitutional trial rights must be knowing, intelligent, and voluntary. City of Bellevue v. Acrey, 103 Wn.2d 203.

207, 691 P.2d 957 (1984). Courts must indulge every reasonable presumption against waiver of fundamental rights. Id. at 207 (citing Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)). The right to be present at trial may be waived so long as the waiver is voluntary and involves an intentional relinquishment of a known right. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003); State v. Thomson, 70 Wn.App. 200, 206, 852 P.2d 1104 (1993) (citing State v. Washington, 34 Wn.App. 410, 413, 661 P.2d 605 (1983)); see also, City of Seattle v. Klein, 161 Wn.2d 554, 559, 166 P.3d 1149 (2007) (waiver is the act of waiving or intentionally relinquishing or abandoning a known right).

Courts must indulge every reasonable presumption against the loss of the constitutional right to be present at a critical stage of the trial. Campbell v. Wood, 18 F.3d 662, 672 (9th Cir. 1994). There can be no knowing and intelligent waiver unless the defendant is aware of the right at issue. See, State v. Sargent, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988) (unless the defendant is informed of his right, he cannot be presumed to know it.); State v. Duckett, 141 Wn.App. 797, 806- 807, 173 P.3d 948 (2007) (“...the court never advised Mr. Duckett of his public trial right or asked him to waive it. He certainly could not then make a knowing, intelligent and voluntary waiver of this constitutional right.”); State v.

Eden, 163 W.Va. 370, 256 S.E.2d 868, 873 (1979) (valid waiver of right to be present requires that the accused has not only a full knowledge of all facts and of his rights, but a full appreciation of the effects of his voluntary relinquishment).

The court must ensure a knowing, voluntary, and intelligent waiver of constitutional rights. “In criminal cases, the court must ensure that any waiver of Section 22 rights is knowing, intelligent and voluntary—which means the court must be sure the defendant knew he possessed such a right and knowingly waived it.” In Detention of Ticeson, 159 Wn.App. 374, 383, 246 P.3d 550 (2011) (citing State v. Strode, 167 Wn.2d 222, 229 n.3, 217 P.3d 310 (2009)). The duty to protect fundamental constitutional rights imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Moreover, CrR 3.4(a) requires the defendant’s presence at voir dire unless excused or excluded by the court for good cause shown. And, when a defendant initially appears for trial but thereafter fails to attend, it is the trial court that must assess several factors to determine whether there has been a knowing and voluntary waiver. State v. Thomson, 123 Wn.2d 877, 880-884, 872 P.2d 1097 (1994).

A court's responsibility to ensure knowing, voluntary and intelligent waiver was discussed in United States v. Gordon. In Gordon, defense counsel successfully moved the court to conduct jury selection in Gordon's absence. Gordon, 829 F.2d at 121. Although counsel claimed he informed Gordon he could attend, counsel also provided misinformation that may have impacted whether Gordon exercised that right. Id. at 126. The Gordon court reversed, holding that Gordon could not knowingly, intelligently, and voluntarily waive his right to participate without an on-the-record colloquy conducted by the trial court. Id. at 124-126.

Consistent with the holding in Gordon, our Supreme Court has held that a defendant's waiver of a constitutional right must be apparent from the record. See, e.g., State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994) (waiver of right to 12 member jury is not valid unless the record reflects some personal expression of waiver by the defendant); State v. Sweet, 90 Wn.2d 282, 287, 581 P.2d 579 (1978) (waiver of right to appeal most clearly shown where the judge questions the defendant about his understanding of the appeal procedure and his intentions with regard to an appeal on the record); State v. DeWeese, 117 Wn.2d 369, 377-78, 816 P.2d 1 (1991) (colloquy on the record reflecting defendant aware of the task involved in self-representation preferred method in determining a

valid waiver of right to counsel); City of Bellevue v. Acrey, 103 Wn.2d at 207 (“...only rarely will adequate information exist on the record, in the absence of a colloquy, to show the required awareness of the risks of self-representation.”).

Cases in which there has been a valid waiver of the right to attend trial proceedings involve a clear and unequivocal waiver, on the record, with full knowledge of the defendant’s rights. See, e.g., Amaya-Ruiz v. Stewart, 121 F.3d 486, 495-496 (9th Cir. 1997), cert. denied, 522 U.S. 1130 (1998) (trial judge informs defendant of right and potential adverse consequences of waiver; defense counsel also stressed consequences of waiver); Campbell v. Wood, 18 F.3d at 670-673 (discussions between defendant and judge in open court regarding consequences of waiving presence for jury selection followed by signed written waiver); Gordon, 829 F.2d at 125-126 (on-the-record waiver only sufficient means to determine valid waiver of right to attend voir dire); State v. Bird, 308 Mont. 75, 43 P.3d 266, 269-272 (2002) (“Consequently, we hold that in the future, a trial court must explain to the defendant, on the record, the defendant's constitutional right to be present at all critical stages of the trial, including in-chambers individual voir dire, and that if a defendant chooses to waive that right, the court must obtain an on-the-record

personal waiver by the defendant acknowledging that the defendant voluntarily, intelligently and knowingly waives that right.”).

The heavy burden of proving the waiver of a constitutional right rests with the State, not the defendant. In re James, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). The record here does not support a finding that Chandra knowingly and intelligently waived her right to be present during voir dire. Although counsel for the State told the court Chandra waived her right to be present and defense counsel indicated Chandra would be present for the afternoon session, after voir dire was completed, there was no on-the-record or even written waiver. There is nothing in the record to indicate the court or anyone else told Chandra she had the right to attend voir dire and the consequences if she did not attend. On this record, the State cannot meet its burden of showing Chandra knowingly and intelligently waived her constitutional right to be present at voir dire. Thus, her conviction should be reversed.

2. THE COURT S REFUSAL TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION PREVENTED CHANDRA FROM PRESENTING HER DEFENSE AND RENDERED THE VERDICT UNRELIABLE.

Defense counsel requested an involuntary intoxication instruction. RP 341-43, 450. The court refused to give the instruction, citing State v. Gabryschak, 83 Wn.App. 249, 253, 921 P.2d 549 (1996), finding there

was insufficient evidence to warrant the instruction and that Chandra claimed she never assaulted Loyd. RP 453-54. Chandra was entitled to the requested instruction.

A defendant is entitled to a jury instruction on her theory of the case when she produces sufficient evidence to support the instruction. State v. Williams, 132 Wn.2d 248, 259–60, 937 P.2d 1052 (1997). A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite intent or mental state. State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002); State v. Kruger, 116 Wn.App. 685, 691, 67 P.3d 1147, review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003); State v. Gallegos, 65 Wn.App. 230, 238, 828 P.2d 37, review denied, 119 Wn.2d 1024, 838 P.2d 690 (1992)).

The evidence supporting the request for an instruction is viewed in the light most favorable to the proponent of the instruction. State v. Bergeson, 64 Wn.App. 366, 367, 824 P.2d 515 (1992). The evidence and all reasonable inferences from the evidence must be viewed in the light most favorable to Chandra. State v. Douglas, 128 Wn.App. 555, 561–62, 116 P.3d 1012 (2005).

Under the test to determine whether a voluntary intoxication instruction should have been given, the first factor is met. Intent is an element of the assault charge. CP 1-4; 32. RCW 9A.36.031(1)(g).

There was also substantial evidence of drinking. Abella testified Chandra was drunk. RP 320. Van, who has known Chandra for ten years testified she was drunk and her level of intoxication was “between 8 and 9” on a scale of 1 to 10. RP 363. Beltran also testified Chandra was drunk. RP 401. Chandra admitted she was drunk. RP 412. She and her group arrived at the club sometime around 11:00 p.m. that evening and between then and the time of the incident, at about 2:00 a.m., she consumed five shots of tequila. RP 170, 294, 312. Chandra also said she was not in her right mind because of her intoxication. RP 415.

The evidence likewise showed Chandra’s intoxication affected her ability to form the required intent. She pushed her friend Beltran and threw her purse at her when Beltran tried to get her back to the car. She tried to push through Loyd who was standing in her way, seemingly oblivious to his presence, so she could get to her brother. And, importantly, she admitted she was not in her right mind. Moreover, the effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol use. State v. Kruger, 116

Wn.App. at 692–93; State v. Smissaert, 41 Wn.App. 813, 815, 706 P.2d 647 (1985).

Here taken in the light most favorable to Chandra, the evidence was sufficient to warrant the requested instruction. Chandra was entitled to a voluntary intoxication instruction.

Chandra's defense, in part, was that she was too intoxicated to have formed the requisite intent to assault Loyd. In opening statements, defense counsel told the jury that Chandra did not intend to assault Loyd because she was drunk. RP 160. That theory was expounded on during closing argument. Defense counsel argued to the jury that Chandra did not know what she was doing because she was drunk and because she was drunk she did not have the requisite mens rea. RP 473, 477, 481.

"Failure to instruct on a party's theory of the case, where there is evidence supporting the theory, is reversible error." State v. Stevens, 127 Wn.App. 269, 274, 110 P.3d 1179 (2005), *aff'd*, 158 Wn.2d 304, 143 P. 3d 817 (2006). Without supporting instruction, the jury must disregard the defense of intoxication despite defense counsel's argument, which renders the verdict unreliable. State v. Kruger, 116 Wn.App. at 688-89; State v. Thomas, 109 Wn.2d 222, 228-29, 743 P. 2d 816 (1987); State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). That is what happened in this case.

The defense theory was that Chandra was too intoxicated to form the requisite intent. The evidence supported the defense theory. If properly instructed, some jurors could have believed Chandra was too drunk to have intended to assault Loyd. The jury, however, was not instructed that it could consider Chandra's intoxication in determining whether the State met its burden of proving the intent element thereby rendering that defense impotent. Chandra is entitled to a new trial.

D. CONCLUSION

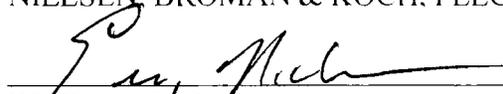
Chandra was denied her rights, under the Fourteenth Amendment and article 1, § 22, to attend jury selection. Because the State cannot show these violations were harmless beyond a reasonable doubt, her convictions should be reversed and the case remanded for a new trial.

Alternately, Chandra was denied her right to have the jury instructed on her defense of voluntary intoxication. Thus, her conviction should be reversed for that reason as well.

DATED this 29 day of June, 2011.

Respectfully submitted.

NIELSEN, BROMAN & KOCH, PLLC

  
ERIC J. NIELSEN  
WSBA No. 12773  
Office ID No. 91051  
Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66728-9-1
	)	
VENITA CHANDRA,	)	
	)	
Appellant.	)	

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**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 29<sup>TH</sup> DAY OF JUNE, 2011 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VENITA CHANDRA  
11102 SE 26<sup>TH</sup> PLACE  
KENT, WA 98030

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF JUNE, 2011.

x *Patrick Mayovsky*