

NO. 67119-7-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

VICTORIA MALLAHAN,

Appellant.

---

---

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

The Honorable Steven J. Mura, Judge

---

---

BRIEF OF APPELLANT

---

---

JARED B. STEED  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

2011 SEP 30 PM 3:58  
FILED  
CLERK OF COURT  
SUPERIOR COURT  
WHATCOM COUNTY  
WA

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural History</u> .....	2
2. <u>Trial Testimony</u> .....	2
3. <u>Skype Testimony</u> .....	10
C. <u>ARGUMENT</u> .....	12
ADMISSION OF KARTER’S TESTIMONY VIA “SKYPE” VIOLATED MALLAHAN’S CONFRONTATION RIGHTS. ...	12
1. <u>The State Did Not Establish Kartar’s Unavailability</u> .....	13
2. <u>Kartar’s Testimony Violated Mallahan’s Sixth Amendment     Rights</u> .....	19
3. <u>The Testimony Prejudiced Mallahan</u> .....	31
D. <u>CONCLUSION</u> .....	34

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

Davis v. Microsoft Corp.  
109 Wn. App. 884, 37 P.3d 333 (2002)  
aff'd, 149 Wn.2d 521, 70 P.3d 126 (2003)..... 22

State v. Aaron  
49 Wn. App. 735, 745 P.2d 1316 (1988)..... 15, 17, 18, 32, 33

State v. Easter  
130 Wn.2d 228, 922 P.2d 1285 (1996)..... 31

State v. Foster  
135 Wn.2d 441, 957 P.2d 712 (1998)..... 19, 20, 21, 22, 28

State v. Goddard  
38 Wn. App. 509, 685 P.2d 674 (1984)..... 15

State v. Hacheny  
160 Wn.2d 503, 158 P.3d 1152 (2007)  
cert. denied, 552 U.S. 1148 (2008)..... 14, 17, 18

State v. Myers  
133 Wn.2d 26, 941 P.2d 1102 (1997)..... 21

State v. Rivera  
51 Wn. App. 556, 754 P.2d 701 (1988)..... 13, 14

State v. Rohrich  
132 Wn.2d 472, 939 P.2d 697 (1997)..... 19

State v. Sanchez  
42 Wn. App. 225, 711 P.2d 1029 (1985)  
rev. denied, 105 Wn.2d 1008 (1986)..... 15

State v. Saunders  
132 Wn. App. 592, 132 P.3d 743 (2006)  
rev. denied, 159 Wn.2d 1017 (2007)..... 32

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Sandoval</u> 137 Wn. App. 532, 154 P.3d 271 (2007).....	27
<u>State v. Shafer</u> 156 Wn.2d 381, 128 P.3d 87 (2006) <u>cert. denied</u> , 549 U.S. 1019 (2006).....	28
<u>State v. Smith</u> 148 Wn.2d 122, 59 P.3d 74 (2002).....	13, 28
<u>State v. Sweeney</u> 45 Wn. App. 81, 723 P.2d 551 (1986).....	14
 <u>FEDERAL CASES</u>	
<u>Barber v. Page</u> 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).....	13
<u>Coy v. Iowa</u> 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).....	19
<u>Craig v. Maryland</u> 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990)..	20-22, 24, 26-29
<u>Delaware v. Van Arsdal</u> 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).....	32
<u>In re Commissioner’s Subpoena</u> 325 F.3d 1287 (11 <sup>th</sup> Cir. 2003) .....	18
<u>Passlogix, Inc. v. 2FA Technology, LLC</u> 708 F.Supp.2d 378 (S.D.N.Y., 2010) .....	1
<u>U.S. v. Bordeaux</u> 400 F.3d 548 (8 <sup>th</sup> Cir. 2005) .....	30
<u>United States v. Yates</u> 438 F.3d 1307 (11 <sup>th</sup> Cir. 2006) .....	22, 23, 24, 26, 27, 28, 29

**TABLE OF AUTHORITIES (CONT'D)**

	Page	
<u>United States v. Gigante</u> 166 F.3d 75 (8 <sup>th</sup> Cir. 1999) <u>cert. denied</u> , 528 U.S. 1114 (2000).....	26, 27, 28, 30	
 <u>OTHER AUTHORITIES</u>		
<u>Fresneda v. State</u> 483 P.2d 1011 (Alaska 1971) .....	13	
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>		
5A K. Tegland, Wash.Prac., <i>Evidence</i> , § 393 (1982).....	16	
 Kraus <u>Virtual Testimony and Its Impact on the Confrontation Clause</u> 34 Champ 26 (May, 2010).....		19
28 U.S.C. §§2072-2077 .....	26	
CrR 4.6.....	29	
ER 804 .....	16	
Federal Rule 15.....	25	
Rule 26.....	26	
 Mutual Legal Assistance in Criminal Matters Act R.S.C. 1985, c. 30, § 18 (1990) .....		18
RCW 9.94A.030 .....	21	
RCW 9A.44.150 .....	20	
U.S. Const. Art. VI .....	1, 2, 13, 18, 20, 21, 23, 24, 26, 27, 28	
Wash. Const. art. I, § 22 .....	12, 27	

A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's Sixth Amendment right to confrontation by allowing a witness to testify at trial via Skype.<sup>1</sup>

2. The State failed to establish the witness was unavailable to testify in person.

Issues Pertaining to Assignments of Error

In appellant's trial for theft, the trial court permitted a State's "material witness" to testify from Canada via Skype. The witness indicated he had "no problem" coming to Washington for trial but expressed concern he could not return to Canada because his permanent residency card was expired. The only evidence the residency card was expired and would prevent return to Canada was the witness's own unsworn e-mail. The State provided no evidence of any efforts taken to compel or facilitate the witness's physical presence at trial.

1. Did the State fail to establish the witness was unavailable to testify in person when it took no action to compel or facilitate his physical presence at trial?

---

<sup>1</sup> "Skype is an internet software application that, among other features, allows users to engage in instant messaging." Passlogix, Inc. v. 2FA Technology, LLC, 708 F.Supp.2d 378, 415 n.10 (S.D.N.Y., 2010).

2. Was appellant denied her Sixth Amendment right to confrontation when the trial court permitted the witness to testify via Skype?

B. STATEMENT OF THE CASE

1. Procedural History

The Whatcom County prosecutor charged appellant Victoria Mallahan and co-defendant Ross Patterson with two counts of first-degree theft. CP 95-96. Mallahan's motion to sever her case from Patterson's was granted during the State's case in chief. 1RP 457-60.<sup>2</sup>

A jury found Mallahan guilty. The jury returned special verdicts finding the thefts were "major economic offenses." CP 63-66. The trial court imposed an exceptional sentence of 18 months on each count to be served concurrently. CP 15-25; 4RP 49-50. Mallahan timely appeals. CP 3-14.

2. Trial Testimony

In 2006, Patterson, Mallahan, Kenneth Roker, and Stephano Monchese formed Canusa, LLC, to purchase foreclosed properties, make

---

<sup>2</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – November 4, 2011, January 3, 2011, January 6, 2011, January 7, 2011, January 10, 2011, January 11, 2011, January 12, 2011, January 13, 2011, January 19, 2011 (early afternoon session), January 20, 2011, January 21, 2011; 2RP – January 19, 2011 (morning session); 3RP – January 19, 2011 (late afternoon session); 4RP – April 18, 2011.

required repairs, and sell them for a profit within two to four months. 1RP 147-49, 154, 178, 492. Canusa's profits were to be divided equally amongst Patterson, Mallahan, Roker, and Monchese. 1RP 156. Mallahan was a realtor in Whatcom County and familiar with properties being foreclosed. 1RP 149-52, 171-72. She, Patterson, Roker, and Monchese looked at several properties for possible purchase, but never went inside. 1RP 150-51, 168-69. Roker did not research property values and instead relied on Mallahan's assertions. 1RP 153.

Roker's role in Canusa was to recruit investors. 1RP 155. Investors were to receive an eight percent return on their investment while "there was not much activity," and a share of the profits during property activity. Because of the eight percent return, investors could not withdraw their money whenever they wanted. 1RP 156. The investment funds were deposited into a Canusa bank account at Wells Fargo Bank. 1RP 154-55, 492. The account statements were sent to Patterson's residence. 1RP 503. Only Patterson and Mallahan had access to the account. 1RP 166.

Roker persuaded his friend, Daniel Mocerri, to make two investments totaling \$200,000. 1RP 157-58, 161-62, 174. Mocerri was to receive a five percent return on any unused portion of the investment according to an agreement notarized by Patterson and signed by Mallahan. 1RP 162-65.

Moceri came to Whatcom County twice to look at property, but no property was purchased on his behalf. 1RP 158-60. When Roker asked Mallahan and Patterson about Moceri's money, Patterson became "very aloof" and did not answer questions directly. 1RP 160-61. Moceri was eventually reimbursed \$150,000 of his original investment. 1RP 166-68, 178. Roker stopped communicating with Patterson and Mallahan in September 2007 because of concerns about Canusa's "transparency." 1RP 161-62, 175.

In June 2007, Mallahan gave friend Palmer Kartar \$10,000 after he asked to borrow money. Mallahan told Kartar she received the money from short-term investments. She offered to invest money on his behalf instead of making him pay back the \$10,000. 1RP 294-97. After meeting with her and Patterson, Kartar agreed to be the "go between" for investors and Canusa. 1RP 302, 358; 2RP 41, 45. He never repaid the \$10,000. 1RP 353-55.

Kartar persuaded Peter and Wanda Florczyk, Robert Mangat, and Balbir Heer to invest in Canusa. 1RP 298-300, 319-20, 351. After meeting with Mallahan and Kartar, Heer agreed to invest "50/50" with Mangat. 1RP 184, 189, 196. Heer looked at two properties with Mallahan and Kartar. After the first "fell through," they looked at the outside of a house Heer later discovered was owned by Mallahan. 1RP 185-88, 201,

220-21. Mallahan said the property could be bought for \$250,000 and sold for at least \$300,000. 1RP 188, 196, 199. Heer gave Mallahan a \$100,300 check made payable to her. 1RP 192, 195, 217. Heer received a receipt for earnest money for the investment. 1RP 194, 218. He understood Kartar would also receive money from his investment. 1RP 198.

Kartar gave Heer a purchase/sale agreement that listed the property closing date as October 31, 2007. The property did not, however, close on that date and Heer asked for his money back. 1RP 197-200, 203. He was not reimbursed. 1RP 192-93. Mallahan gave several explanations for why the money had not been returned, and Patterson assured him Mallahan was trustworthy. 1RP 200, 203-04. Heer said he invested because he trusted Kartar. 1RP 227-28.

Mangat met Mallahan through Kartar and Heer. He gave Mallahan two checks totaling \$147,700. Mallahan gave him an unsigned receipt and a purchase/sale agreement. 1RP 242-48, 256. Mangat never received any property or reimbursement from Mallahan. 1RP 249-50, 254. He admitted he was reimbursed in full for his principal investment by Mallahan's brother-in-law. 1RP 255, 261.

Peter testified Kartar told him about a real estate investment opportunity while he was doing renovations on Kartar's house. 1RP 262,

267-68. Kartar never mentioned Canusa, and Peter never met Mallahan or Patterson. 1RP 263-64, 267-68. Based on Kartar's assertions, Peter convinced his mother Wanda to invest. 1RP 262-63, 270-72.

Wanda testified she never met Mallahan or Patterson. 1RP 270. Wanda gave Peter a \$100,000 check made payable to Mallahan. Peter gave the check to Kartar. 1RP 272. Wanda said Kartar returned the check and asked her to sign a new one made payable to Custom House. Wanda cancelled the first check, signed a second check payable to Custom House, and gave it to Kartar. 1RP 272-75, 279, 289. Kartar gave Wanda a receipt. 1RP 277. She never received property or reimbursement for the \$100,000 investment. 1RP 276-77, 280. Wanda acknowledged all the information and interactions she had regarding the investment were with Kartar and not Mallahan. 1RP 288-89. Kartar admitted Wanda and Peter never met Patterson or Mallahan. 1RP 362.

Kartar denied directing Heer or Magant to write checks. 1RP 308-09. Kartar testified the first check from Wanda was made payable to Mallahan at Mallahan's direction. 1RP 322-23. Mallahan later told him the check would take too long to clear the bank and said Patterson would contact him with further directions. 1RP 323-24. Patterson told Kartar to deposit the second check from Wanda at Custom House. 1RP 325-27,

350. Kartar did not know what the account at Custom House was for and did not receive a receipt. 1RP 329.

Mallahan faxed Kartar the purchase/sale agreement for Heer and Magant. 1RP 310, 313. Mallahan had filled in the purchase price, closing date, and address before she faxed the agreement. 1RP 311-16. The agreement had no buyer listed and no legal description of the property. 1RP 357, 371. Kartar had Heer and Magant sign the agreement and returned it to Mallahan. 1RP 311-12, 315-16. Kartar admitted he was not present when Mallahan signed the agreement. 1RP 312.

Kartar prepared an investment contract for Mallahan to sign regarding the Florczyk investment. The terms of the contract included an eight percent return on the investment after 90 days. 1RP 331-34, 361. Mallahan signed the document. 1RP 332.

Mallahan sent Kartar a sale document with numbers and "Canusa" written on it. 1RP 334. A representative of Whatcom County told him the numbers on the document were for property that did not exist. Kartar never saw any property related to Florczyk's investment. 1RP 336-37.

Kartar admitted he was supposed to benefit financially from the Heer, Magant and Florczyk investments, but never did. Kartar did not invest any of his own money in Canusa. 1RP 342-43, 352, 365.

In early 2008, Magant and Wanda Florczyk contacted police. 1RP 250, 288. Detective Alan Smith spoke with Mallahan four times. 1RP 385, 441; 2RP 48, 52. Smith testified Mallahan deposited \$100,000 of Heer's check into Canusa's Wells Fargo account and the remainder into a U.S. Bank account in her name. 1RP 389, 393-95, 435. Smith said money from the Canusa account was wired to Mocerri. 1RP 422-23, 479-80, 484.

Magant's first check was endorsed by Mallahan and deposited in the Canusa account. 1RP 422. Magant's second check was deposited into a Bank of America account in Mallahan's name. 1RP 425-27, 437.

Florczyk's check was transferred to a Bank of America account in Patterson's name. 1RP 427-29, 434-35. \$60,000 was transferred from Patterson's Bank of America account to Mallahan's Bank of America account and finally to a Washington Mutual account. 1RP 430-32. Mallahan told Smith she signed a blank contract for the Florczyk investment but had no knowledge of what it was for. 1RP 401-03. Smith admitted there was little evidence connecting Mallahan to Florczyk's money but for her name being on the first cancelled check. 1RP 483-84.

Mallahan told Smith she had no intention of selling her house and used it as a potential property purchase to gain more investors. 1RP 391-93, 473. Mallahan listed her house on the Heer sale/purchase agreement

so a real property would appear in a search. 1RP 389-90. Patterson told Mallahan to draft the purchase/sale agreement. 1RP 468.

Mallahan denied showing Heer, Magant, or Florczyk any property. 3RP 7. Mallahan said although she may have printed a receipt for earnest money and sent it to Kartar, she did not write on the receipt. 3RP 4-6, 24. She did, however, fill in the date, seller, and address on the purchase/sale agreement before signing and sending it to Kartar. 3RP 7-10, 18, 37

Mallahan said she picked up Heer's check with Kartar. 1RP 500; 3RP 25. Mallahan was alone when she picked up Magant's check. 1RP 500-01. She deposited \$99,700 into the Canusa account and \$50,000 into her personal U.S. Bank account. 1RP 501-02; 3RP 26. She transferred \$100,000 of Heer's investment to Mocerri at Monchese's direction. 3RP 4, 30-31. Mallahan never met Wanda Florczyk and denied having anything to do with her investment. 1RP 492, 496-97, 502-03; 3RP 41. She merely signed Florczyk's investment contract after someone else had written out its terms. 3RP 45-46. Mallahan did not determine where Canusa investment money went. 3RP 17, 33, 36. She said she was in love with Patterson and did whatever he asked because, "it made me feel good to be a part of something that he was doing, and I believed in him." 3RP 38.

### 3. Skype Testimony

Approximately one month before trial, the State filed a motion requesting Kartar's trial testimony be presented through video taped deposition, or alternatively, Skype live video. CP 105-08. The prosecutor's affidavit stated, "Mr. Kartar resides in Canada and has a permanent residency card which has expired. Mr. Kartar is a material witness for the State in the trial and he will likely be unable to attend trial." CP 105.

The prosecutor attached two unsworn e-mails from Kartar. In the first, Kartar acknowledged he had a valid passport and anticipated his residency card to be renewed in February or March 2011. Kartar's second e-mail stated, "I have no problem coming over for the trail [*sic*] on Jan. 11<sup>th</sup> 2011," but indicated Canadian authorities said they could refuse him re-entry because of his expired card. Kartar noted a letter from the prosecutor and court might help him re-enter Canada. CP 108.

The State's motion was not addressed until shortly before trial. At that time the prosecutor stated:

He [Kartar] can't get back up. I worked with my office in what the prosecutor's office can do in terms of assisting him with that. We have no control over Canadian authorities, obviously, as the court realizes. That's what I was told by my staff, that we have no authority to assist him in getting back into Canada.

1RP 12-13.

The prosecutor did not elaborate on what assistance her office provided. There is no evidence the State tried to compel Kartar's physical presence at trial. The prosecutor did not dispute defense counsel's assertions that Kartar was never subpoenaed. 1RP 14-15.

Mallahan's attorney objected to the live video, stating, "If Mr. Kartar has relevant evidence, then the State should bring him in." 1RP 24. Defense counsel also noted Kartar's assertions he could not re-enter Canada were unsworn and "purely speculative." 1RP 15-16.

The trial court permitted Kartar to testify via Skype video because he was "in effect" refusing to be physically present. 1RP 24, 28. The trial court noted it preferred live video to a deposition because, "there's not only the issue of what the testimony is but also observing the witness and their demeanor and things of that nature." 1RP 13. The trial court said it would administer an oath to Kartar outside the presence of the jury, and require a second oath be administered from Canada in front of the jury. 1RP 28-29.

Both defense attorneys renewed objections to the Skype testimony before trial.<sup>3</sup> 1RP 66, 70. The trial court rejected the argument that live

---

<sup>3</sup> Patterson's attorney specifically noted the State had not used The Treaty Between the United States and Canada on Mutual Legal Assistance in

video testimony was not statutorily authorized, stating, “the legislature doesn’t dictate what I do in my courtroom to conduct trials.” 1RP 71.

Affirming its earlier ruling, the court stated:

I say as a matter of law live testimony via the Internet is no different than having a witness sitting in the chair. It’s the same...I’m saying that testifying via the Internet live with attorneys confronting the witness and the jury seeing the witness and the witness’ demeanor is no different than being in this courtroom. You can take it to the Court of Appeals and see who’s right.

1RP 70-71.

Neither the court minute entries nor the verbatim report of proceedings reflect whether two oaths were administered to Kartar before his testimony. See 1RP 290.

C. ARGUMENT

ADMISSION OF KARTER’S TESTIMONY VIA “SKYPE”  
VIOLATED MALLAHAN’S CONFRONTATION RIGHTS.

An accused person has both state and federal constitutional rights to confront witnesses. Article I, section 22 guarantees an accused “shall have the right . . . to meet the witnesses against him face to face[.]” Likewise, the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” The trial court erred when it allowed Kartar to

---

Criminal Matters to secure Kartar’s physical presence at trial. 1RP 66. See n.5 infra. The prosecutor did not dispute this assertion.

testify by Skype because the State did not establish he was unavailable to testify in person. Kartar's testimony violated Mallahan's Sixth Amendment confrontation rights. Reversal is required.

1. The State Did Not Establish Kartar's Unavailability.

A witness is "unavailable" under the Confrontation Clause only if demonstrably unable to testify in person. Crawford v. Washington, 541 U.S. 36, 45, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The State must make a good-faith effort to obtain the witness' presence and the witness must rebuff that effort. Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); State v. Smith, 148 Wn.2d 122, 132, 59 P.3d 74 (2002). Good faith requires "untiring efforts in good earnest." State v. Rivera, 51 Wn. App. 556, 559, 754 P.2d 701 (1988) (quoting Fresneda v. State, 483 P.2d 1011, 1017 (Alaska 1971)).

"[C]ourts have required prosecutors to utilize available statutory procedures to produce a witness for trial before the witness may be considered unavailable." Smith, 148 Wn.2d at 133. A witness' mere failure to honor a subpoena is insufficient. Rivera, 51 Wn. App. at 560. Issuance of a warrant, coupled with other reasonable efforts, may satisfy the standard. Rivera, 51 Wn. App. at 560. Certainly, however, "[i]f it becomes apparent that a witness is no longer cooperating, resort to

statutory mechanisms to compel attendance must be utilized.” Rivera, 51 Wn. App. at 560.

The State failed to prove Kartar was unavailable. Though acknowledging Kartar was a “material witness,” the State failed to subpoena him, request a material witness warrant, or otherwise compel his attendance at trial. The State instead relied on Kartar’s unsworn assertion he could not testify in person because of his concern he would be unable return to Canada. But Kartar stated he had “no problem coming over for the trail (sic) on Jan. 11<sup>th</sup>, 2011” if the State could assist in his return to Canada. And while the prosecutor stated, “I worked with my office in what the prosecutor’s office can do in terms of assisting him with that,” there is no evidence as to what those efforts included. This is insufficient to prove Kartar was unavailable to testify in person.

Washington courts have long recognized that a witness’ absence from the jurisdiction alone is not enough to satisfy the confrontation clause’s unavailability requirement. State v. Hacheney, 160 Wn.2d 503, 521, 158 P.3d 1152 (2007), cert. denied, 552 U.S. 1148 (2008); See e.g., Rivera, 51 Wn. App. at 560 (“Good faith” requirement not met where State subpoenaed but made no attempt to locate witness); State v. Sweeney, 45 Wn. App. 81, 86, 723 P.2d 551 (1986) (Witness not unavailable where State made no attempt to secure presence using statute

for obtaining out-of-state witnesses); State v. Sanchez, 42 Wn. App. 225, 711 P.2d 1029 (1985) (Witness not unavailable where State did not subpoena witness or accept the defendant's offer to postpone trial to accommodate witness' vacation), rev. denied, 105 Wn.2d 1008 (1986); State v. Goddard, 38 Wn. App. 509, 513, 685 P.2d 674 (1984) (admission of witness' deposition reversible error when State did not issue subpoena or attempt to induce witness to remain in the state).

In State v. Aaron, 49 Wn. App. 735, 745 P.2d 1316 (1988), Tina Schwedop witnessed Aaron burglarizing her home. The State deposed Schwedop because she was scheduled to move to England for six months and had a non-exchangeable airline ticket. Aaron's attorney neither objected to the deposition nor cross-examined Schwedop. The State moved for admission of the deposition at trial, claiming she was a material witness and unavailable because she was in England. Though "clearly troubled by the State's apparent lack of effort to obtain Schwedop's presence at trial," the trial court found the deposition admissible. Aaron, 49 Wn. App. at 738-39.

Aaron challenged the admissibility of the deposition for the first time on appeal. Noting the State's failure to make any effort to obtain Schwedop's presence at the time of trial, this Court concluded Schwedop

was not “unavailable” under ER 804<sup>4</sup> and her deposition was erroneously admitted. Aaron, 49 Wn. App. at 739-40 (recognizing “constitutional unavailability requirement more stringent than unavailability requirement of ER 804”) (citing 5A K. Tegland, Wash.Prac., *Evidence*, § 393 (2d ed. 1982)).

The Court of Appeals noted the parties and trial judge “assumed that Schwedop was beyond the reach of legal process at the time of trial,” but found that even if this were true, the State must use “any available

---

<sup>4</sup> ER 804(a) defines “unavailability” of a witness as follows:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or
- (2) Persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or
- (3) Testifies to a lack of memory of the subject matter of the declarant’s statement; or
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.
- (6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

means to compel the presence of the witness.” Aaron, 49 Wn. App. at 742-43. The Court stated good-faith efforts required the prosecution to attempt to secure her “voluntary presence” and show that she “was financially unable to return, or if asked, would have declined to return.” Aaron, 49 Wn. App. at 743.

The Supreme Court distinguished Aaron in Hacheney. In that case, three subpoenaed witnesses indicated they would be leaving the United States before Hacheney’s murder trial. The State’s motion for videotaped depositions was granted and Hacheney’s attorney cross-examined each witness. Hacheney, 160 Wn.2d at 509. At trial, the State submitted letters from all three witnesses confirming they were out of the country and would not return during the trial despite being under subpoena. Over defense counsel’s objection, the trial court admitted the video depositions in lieu of the witnesses’ live testimony. Hacheney, 160 Wn.2d at 521.

The Supreme Court concluded admission of the videotaped depositions did not violate Hacheney’s confrontation clause rights because the witnesses were unavailable for trial. The Court stated unlike Aaron -- where the State made “no effort” to procure Schwedop’s testimony at trial -- the prosecutor never released the witnesses from their subpoenas. The Court noted, “in that case [Aaron], the witness was not subpoenaed, there

was no evidence in the record as to whether she had ever been asked to return voluntarily for trial, and the absent witness was crucial.” Hacheny, 160 Wn.2d at 522-23.

This case is similar to Aaron and distinguishable from Hacheny. Like Aaron, the State made no effort to procure Kartar’s attendance. Instead the State assumed Kartar was beyond the court’s legal process. But in addition to subpoenas and material witness warrants, methods exist for compelling the presence of Canadian residents. See e.g. Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30, § 18(2)(a) (4<sup>th</sup> Supp.) (Upon application a Canadian Judge may “order the examination, on oath or otherwise, of a person named therein, order the person to attend at the place fixed by the person designated...for the examination and to remain in attendance until he is excused by the person so designated[.]”).<sup>5</sup> No evidence shows the prosecutor used any of these methods. Moreover, unlike Hacheny, Kartar stated he was willing to testify in person if the

---

<sup>5</sup> The Treaty Between the United States and Canada on Mutual Legal Assistance in Criminal Matters (MLAT) was entered on January 24, 1990, and “obligates the two governments to provide ‘mutual legal assistance in all matters relating to the investigation, prosecution and suppression of offences.’” In re Commissioner’s Subpoena, 325 F.3d 1287, 1290-91 (11<sup>th</sup> Cir. 2003) (citing MLAT, art. II, ¶ 1). See also U.S. Const. Art. VI, Cl. 2 (“[a]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

State would help him with reentry into Canada. The State's failure to take any discernible action to ensure Kartar's voluntary presence is insufficient to establish his unavailability to testify in person.

2. Kartar's Testimony Violated Mallahan's Sixth Amendment Rights.

Notwithstanding the State's failure to establish Kartar's unavailability, his testimony via Skype violated Mallahan's Sixth Amendment rights.

"The confrontation clauses of the state and federal constitutions guarantee the right of an accused to confront witnesses against him or her 'face to face.'" State v. Foster, 135 Wn.2d 441, 466, 957 P.2d 712 (1998). Live testimony is preferred because face-to-face confrontation enhances the accuracy of fact finding. State v. Rohrich, 132 Wn.2d 472, 479, 939 P.2d 697 (1997); Coy v. Iowa, 487 U.S. 1012, 1019, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988). Indeed, witnesses are often judged by the "manner in which they enter the courtroom, their willingness to make eye contact with trial participants, and their ability to control nervous gestures as they deliver their testimony." Kraus, Virtual Testimony and Its Impact on the Confrontation Clause, 34 Champ 26, 29 (May, 2010).

This "preferred right of physical presence" may be dispensed with only if (1) excusing the physical presence of the particular witness is

necessary to further an important public policy and (2) the reliability of the testimony is otherwise assured. Foster, 135 Wn.2d at 466 (citing Craig v. Maryland, 497 U.S. 836, 850, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990)).

Craig and Foster are instructive by way of contrast. In Craig, the Supreme Court analyzed whether a Maryland statute permitting children to testify by one-way, closed-circuit television from outside the courtroom violated Sixth Amendment confrontation clause rights. Craig could see the testifying child on a video monitor and communicate with defense counsel, who was present with the witness, but the witness could not see Craig. Craig, 497 U.S. at 840-42.

Applying the two-part test above, the Court concluded where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, the Confrontation Clause does not prohibit use of one-way closed-circuit television. Craig, 497 U.S. at 858. Relying on Craig, five justices concluded use of closed-circuit testimony under RCW 9A.44.150<sup>6</sup> did not violate the confrontation

---

<sup>6</sup> RCW 9A.44.150 provides in relevant part:

(1) On motion of the prosecuting attorney in a criminal proceeding, the court may order that a child under the age of ten may testify in a room outside the presence of the defendant and the jury while one-way closed-circuit television equipment simultaneously projects the child's testimony into another room so the defendant and the jury can watch and hear the child testify if:

clause under Article I, section 22 or the Sixth Amendment. Foster, 135 Wn.2d at 470.

Craig and Foster are easily distinguishable for several reasons. First, unlike this case, the method for allowing child testimony via one-way, closed-circuit television is specifically authorized by statute. See State v. Myers, 133 Wn.2d 26, 32, 941 P.2d 1102 (1997) (Statutes are presumed constitutional, and the party challenging them has the burden of proving otherwise). Additionally, the public policy concern of preventing witness trauma caused by testifying in the physical presence of the

---

(a) The testimony will:

(i) Describe an act or attempted act of sexual contact performed with or on the child witness by another person or with or on a child other than the child witness by another person;

(ii) Describe an act or attempted act of physical abuse against the child witness by another person or against a child other than the child witness by another person; or

(iii) Describe a violent offense as defined by RCW 9.94A.030 committed against a person known by or familiar to the child witness or by a person known by or familiar to the child witness;

(b) The testimony is taken during the criminal proceeding;

(c) The court finds by substantial evidence, in a hearing conducted outside the presence of the jury, that requiring the child witness to testify in the presence of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably communicating at the trial. If the defendant is excluded from the presence of the child, the jury must also be excluded;

accused is inapplicable. Kartar expressed no apprehension about testifying against Mallahan. His willingness to testify in person suggests the opposite.

Most importantly, however, Craig and Foster do not address the issue presented here: whether, absent an “important public policy” interest, the use of two-way live video conferencing violates the confrontation clauses of the state and federal constitutions. Because Washington courts have not addressed this issue, consideration of federal case law is instructive. Cf. Davis v. Microsoft Corp., 109 Wn. App. 884, 891, 37 P.3d 333 (2002) (“because the issue...is a matter of first impression in Washington, we look to federal case law for guidance.”), aff’d, 149 Wn.2d 521, 70 P.3d 126 (2003).

The Eleventh Circuit Court of Appeals squarely addressed this issue in United States v. Yates, 438 F.3d 1307 (11<sup>th</sup> Cir. 2006). Yates and Pusztai were charged with mail fraud, conspiracy to commit money laundering and defraud the United States (U.S.), and various prescription-drug-related offenses. Pretrial, the Government requested the admission of testimony from two “essential witnesses” living in Australia by means of a live, two-way video conference. The Government noted, “Although both witnesses are willing to testify at trial via video teleconference, they are unwilling to travel to the United States.” Yates, 438 F.3d at 1309-10.

Defense counsel did not dispute the witness's refusal to travel to the U.S., but objected to the motion, arguing the testimony would violate Yates and Pusztai's Sixth Amendment confrontation rights because it would deny them face-to-face encounters with the witnesses. The district court granted the motion, finding the confrontation rights would not be violated because the two-way video conference would allow Yates and Pusztai to see the witnesses and vice versa during the testimony. The court also found that the Government asserted an "important public policy of providing the fact-finder with crucial evidence," and that "the Government also has an interest in expeditiously and justly resolving the case." Yates, 438 F.3d at 1310.

Because the courtroom was not outfitted with video equipment, the trial was temporarily moved to the U.S. Attorney's office for the video conference. At trial, defense counsel again objected on Sixth Amendment grounds. Before questioning, the witnesses were sworn in by the district court and acknowledged their testimony was under oath and subject to penalty for perjury. Despite minor technical difficulties, everyone could see the testifying witnesses on a television monitor, and the witnesses could see the conference room. Defense counsel cross-examined both witnesses. Yates and Pusztai were found guilty on all counts. Yates, 438 F.3d at 1310.

The Court of Appeals reversed, finding the video conference testimony violated their Sixth Amendment confrontation rights. Yates, 438 F.3d at 1319. The court recognized the right to a physical face-to-face meeting is not absolute and may be compromised under limited circumstances, but concluded the case presented “no necessity of the type Craig contemplates.” Yates, 438 F.3d at 1312, 1316.

Employing Craig’s test for admissibility, the court held the Government’s need for video conferencing to expeditiously present its case was not a public policy important enough to outweigh the right to confront accusers face-to-face. Yates, 438 F.3d at 1313, 1316. The Court stated:

If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference.

Yates, 438 F.3d at 1316.

The Court also rejected the Government’s assertion that two-way video conferencing testimony is more protective of confrontation rights than admitting unavailable witness testimony via deposition. The Court

recognized Federal Rule 15<sup>7</sup> was carefully designed to protect defendants' rights to physical face-to-face confrontation by ensuring their opportunity to be present at the deposition. The Court also noted the Supreme Court

---

<sup>7</sup> Rule 15 of the Federal Rules of Criminal Procedure provides in relevant part:

**(a) When Taken.**

**(1) In General.** A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

...

**(c) Defendant's Presence.**

**(1) Defendant in Custody.** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

**(A)** waives in writing the right to be present; or

**(B)** persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

**(2) Defendant Not in Custody.** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant--absent good cause--waives both the right to appear and any objection to the taking and use of the deposition based on that right.

had rejected a proposed revision to Rule 26<sup>8</sup> which would have allowed testimony by two-way video conference. Yates, 438 F.3d at 1314-15 (citing 207 F.R.D. 89). The Court summarized, “[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation.” Yates, 438 F.3d at 1315.

Finally, the Court rejected the Government’s comparison to United States v. Gigante, 166 F.3d 75 (8<sup>th</sup> Cir. 1999), cert. denied, 528 U.S. 1114 (2000). Yates, 438 F.3d at 1313. Gigante was charged with several crimes associated with his alleged involvement with the New York mafia. Gigante, 166 F.3d at 78-79. At trial, a former mafia associate “in the final stages of inoperable, fatal, cancer” was permitted to testify for the Government via two-way closed circuit television from an undisclosed location where he was receiving medical care. Gigante, 166 F.3d at 79-80.

Refusing to apply the Craig factors, the Gigante court nonetheless concluded the testimony did not violate the Sixth Amendment because the closed circuit television procedure preserved all the characteristics of in-court testimony. Gigante, 166 F.3d at 80-81.

---

<sup>8</sup> Rule 26 of the Federal Rules of Criminal Procedure states, “In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§2072-2077.”

The Yates Court concluded Gigante should have applied the Craig factors, which likely would have been satisfied since the witness was participating in the Federal Witness Protection Program at an undisclosed location, had inoperable, fatal cancer, and was unable to travel due to medical problems. Yates, 438 F.3d at 1313.

Finding that denial of Yates and Pusztai's Sixth Amendment rights to face-to-face confrontation was not necessary to further an important public policy, the Yates Court declined to address whether the testimony was sufficiently reliable. Yates, 438 F.3d at 1318.

Yates should apply with equal force in Mallahan's case. No Washington court has found the confrontation clause in article 1, section 22 less protective than its Sixth Amendment counterpart. See State v. Sandoval, 137 Wn. App. 532, 539, 154 P.3d 271 (2007) (recognizing the meaning of the words used in article 1, section 22 and the Sixth Amendment are substantially similar and "constitutional history does not support a broader interpretation of article 1, section 22 than that provided under the Sixth Amendment."); see also State v. Shafer, 156 Wn.2d 381, 393, 128 P.3d 87 (2006) (Chambers, J. concurring) ("It is my view that in the appropriate circumstances, our constitution may provide greater protection than the Sixth Amendment...Indeed the markedly different text

alone (only one of the Gunwall<sup>9</sup> factors), perhaps the most important factor, strongly supports a conclusion that Washington's confrontation clause provides greater protections." ), cert. denied, 549 U.S. 1019 (2006).<sup>10</sup>

Furthermore, Yates is factually indistinguishable. As in Gigante, here the trial court failed to apply the Craig factors. Like Yates, the State did not establish, and the trial court did not find, that denial of Mallahan's right to face-to-face confrontation was essential to further an important public policy interest. Indeed, the only public policy interest hinted at was the very one rejected by Yates: the State's need for video conferencing testimony to expeditiously prove its case. Instead, the trial court erroneously assumed Mallahan's confrontation rights would not be violated because "live testimony via the Internet is no different than having a witness sitting in the chair." 1RP 70-71. But, like Yates, two-way live video conferencing is not authorized by the superior court

---

<sup>9</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)

<sup>10</sup> But see Shafer, 156 Wn.2d at 391 (recognizing that a majority of justices in Foster agreed that the state confrontation clause should be interpreted independently from the Sixth); Smith, 148 Wn.2d at 131 (same).

criminal rules, and the State failed to show why it could not depose Kartar in accordance with CrR 4.6.<sup>11</sup>

Kartar's testimony also fails the second Craig factor. Though Yates declined to address whether testimony via two-way video

---

<sup>11</sup> CrR 4.6 provides:

**(a) When Taken.** Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or if a witness refuses to discuss the case with either counsel and that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

**(b) Notice of Taking.** The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time and may change the place of taking.

**(c) How Taken.** A deposition shall be taken in the manner provided in civil actions. No deposition shall be used in evidence against any defendant who has not had notice of and an opportunity to participate in or be present at the taking thereof.

**(d) Use.** Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as witness, or as substantive evidence under circumstances permitted by the Rules of Evidence.

**(e) Objections to Admissibility.** Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

conference is sufficiently reliable, the Eighth Circuit has concluded testimony via similar two-way closed circuit television<sup>12</sup> is not. In Bordeaux, the district court permitted the complaining child witness to testify via two-way closed circuit television after finding her fear of Bordeaux rendered her unable to testify in open court. Bordeaux, 400 F.3d at 552.

On appeal Bordeaux argued the two-way closed circuit testimony violated his sixth amendment confrontation rights. The Court of Appeals agreed, noting the systems do not ensure the reliability of face-to-face confrontation because they “do not provide the same truth-inducing effect.” Bordeaux, 400 F.3d at 554. The Court noted:

[A] defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the courtroom. We are not alone in noting that something may be lost when a two-way closed-circuit television is employed, for even the *Gigante* court admitted that there may be “intangible elements” of confrontation that are “reduced or eliminated by remote testimony.”

Bordeaux, 400 F.3d at 554.

As in Bordeaux, the reliability of Kartar’s testimony cannot be assured because Skype lacks the same “truth-inducing effect” of live

---

<sup>12</sup> See U.S. v. Bordeaux, 400 F.3d 548, 552 (8<sup>th</sup> Cir. 2005) (“A two-way closed-circuit system allows those in the courtroom to watch the witness on television and also allows the witness to see the defendant on television.”)

testimony. Moreover, the danger of reduced reliability is compounded here by the fact that Kartar was permitted to testify from an unknown location in Canada where he was less likely to be subject to perjury repercussions in Washington. Although the court discussed Kartar being sworn twice, it is unclear whether that occurred. In any event, the State did not dispute that if Kartar perjured himself, Washington authorities would not be able to arrest him in Canada. 1RP 20.

For all these reasons, admission of Kartar's testimony violated Mallahan's face-to-face right of confrontation.

### 3. The Testimony Prejudiced Mallahan.

Confrontation clause violations are subject to constitutional harmless error analysis. State v. Koslowski, 166 Wn.2d 409, 431, 209 P.3d 479 (2009). Prejudice is presumed, and the state bears the burden of proving harmlessness. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). An error is prejudicial unless the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Koslowski, 166 Wn.2d at 431. The reviewing court must be convinced beyond a reasonable doubt that "any reasonable jury would reach the same result absent the error." Easter, 130 Wn.2d at 242. Relevant factors include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of

evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case.” State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 686-87, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)), rev. denied, 159 Wn.2d 1017 (2007).

The State cannot show the violation of Mallahan's confrontation rights was harmless beyond a reasonable doubt. By the State's own admission, Kartar was a "material witness:"

Mr. Kartar is the witness that found the Canadian investors to give money to Ms. Mallahan or Mr. Pat[t]erson. Mr. Kartar's testimony is necessary to explain the facts to the jury as to how and why the defendants received over \$300,000.00 and the money was never returned as promised by Ms. Mallahan and/or Mr. Pat[t]erson. Mr. Kartar significantly interacted with Ms. Mallahan, and in part with Mr. Pat[t]erson in the financial transactions which are the subject of the criminal charges.

CP 106.

In Aaron, this Court noted though the State presented "substantial circumstantial evidence" linking Aaron to the alleged crime, Schwedop's evidence "permeated the testimony of all of the other State witnesses." Concluding the erroneous admission of Schwedop's statement was not harmless beyond a reasonable doubt, this Court reversed Aaron's convictions. Aaron, 49 Wn. App. at 745-46.

As in Aaron, Kartar's testimony connecting Mallahan with the Florczyk transaction "permeated" all other evidence. Kartar's testimony was crucial to the alleged Florczyk theft. Kartar admitted he was responsible for convincing Peter and Wanda Florczyk to invest with Mallahan. The Florzyks never met Mallahan, discussed property investments with her, nor personally gave her any money. Thus, the only testimony connecting Mallahan with the Florzyks was Kartar's testimony that Mallahan signed a contract he prepared and told him what to do with Florczyk's check.

Given the importance of Kartar's testimony, and the State's inability to ensure its reliability, the violation of Mallahan's confrontation rights was not harmless beyond a reasonable doubt. Reversal is required.

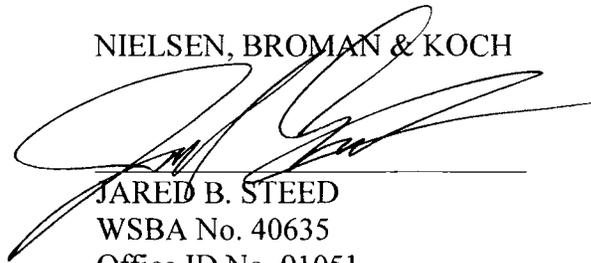
D. CONCLUSION

For the reasons discussed above, Mallahan's convictions should be reversed and the case remanded.

DATED this 30<sup>th</sup> day of September, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

JARED B. STEED  
WSBA No. 40635  
Office ID No. 91051  
Attorneys for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67119-7-I
	)	
VICTORIA MALLAHAN,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

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

THAT ON THE 30<sup>TH</sup> DAY OF SEPTEMBER, 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] ELIZABETH GALLERY  
WHATCOM COUNTY PROSECUTOR'S OFFICE  
SUITE 201  
311 GRAND AVENUE  
BELLINGHAM, WA 98227
  
- [X] VICTORIA MALLAHAN  
NO. 348890  
MISSION CREEK CORRECTIONS CENTER FOR WOMEN  
3420 NE SANDHILL ROAD  
BELFAIR, WA 98528

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2011.

x *Patrick Mayovsky*