

68935-5

68935-5

NO. 68935-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

RAYNE DEE WELLS, JR.,

Appellant.

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

The Honorable John M. Meyer, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it found appellant's Motion for Withdrawal of Plea was time-barred under RCW 10.73.090 and, consequently, transferred the motion to this Court as a Personal Restrain Petition (PRP).

Issue Pertaining to Assignment of Error

Where appellant's motion to withdraw his plea was not time-barred under RCW 10.73.090, demonstrated he was entitled to relief, and showed that a factual hearing would be required for resolution, did the trial court err in transferring the motion to this Court pursuant to CrR 7.8(c)(2)?

B. STATEMENT OF THE CASE

On December 22, 2000, the Skagit County prosecutor charged appellant Rayne Wells, Jr. with one count of first degree unlawful possession of a firearm, one count second degree malicious mischief, and one count second degree escape. CP 1-2. After making a deal, Wells pled guilty to one count of second degree unlawful possession of a firearm, one count of second degree malicious mischief, and one count of second degree escape. CP 50, 65-72. The parties mistakenly believed Wells' offender score was six and his standard ranges were 22-29 months

(counts 1 and 3) and 12-14 months (count 2). CP 66, 1RP 2.<sup>1</sup> As part of the plea bargain, the prosecutor recommended Wells serve 12-months plus a day to run concurrent with other charges in Island County. CP 67. Wells believed he was benefiting by getting an exceptional sentence downward on counts 1 and 3. CP 62-63; 1RP 8. The trial court accepted the State's recommendation and entered a specific finding supporting an exceptional sentence downward for counts 1 and 3. Supp. CP \_\_ (sub no. 9, judgment and sentence), Supp. CP \_\_ (sub no. 7, Findings of Facts and Conclusions of Law for an Exceptional Sentence).

On December 14, 2009, Wells moved to withdraw his guilty pleas and the case was eventually transferred to this Court as a PRP.<sup>2</sup> Supp. CP \_\_ (sub no. 27, Motion for Relief from Judgment/Withdrawal of Plea). Specifically he argued:

- The Skagit County Superior Court had no jurisdiction over the prosecution for escape because the criminal act occurred in King County.

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<sup>1</sup> The transcripts are referred to as follows: 1RP (June 4, 2012) and 2RP (June 14, 2012).

<sup>2</sup> Appellant was acting without counsel when he made his prior motion and the decision to convert his motion to a PRP was done

- The adult Superior Court lacked jurisdiction to render a judgment and sentence.
- The sentence for first degree unlawful possession of a firearm was invalid because the State failed to prove all the elements for a first degree violation and Wells only pled guilty to those elements constituting second degree unlawful possession of a firearm.
- The plea was invalid because the trial court failed to have Wells' competency evaluated before taking the plea.
- Wells received ineffective assistance of counsel because defense counsel failed to raise issues pertaining to jurisdiction and competency and failed to make the State meet its burden on the possession charge.

Id. The Acting Chief Judge of this Court dismissed the PRP. CP 39.

Wells sought review in the Washington Supreme Court regarding the issues of adult-court jurisdiction and insufficiency of

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outside Wells' presence. 2RP 12; Supp. CP \_\_\_ (sub no. 27, Motion for Relief from Judgment/Withdrawal of Plea).

the evidence for the firearm conviction. On March 16, 2012, Washington Supreme Court Commissioner Steven Goff (the Commissioner) issued a "Ruling Conditionally Denying Review." He concluded the superior court had competent jurisdiction. However, he found the judgment and sentence to be "technically flawed." First, the judgment and sentence was silent on Wells' offender score, sentencing range, maximum sentence, and criminal history. Second, it stated Wells was convicted of first degree unlawful possession of a firearm, but Wells actually pled guilty to a second degree firearm offense. The Commissioner concluded the technical flaws did not render the judgment and sentence invalid for purposes of avoiding RCW 10.73.090's time bar, because Wells was sentenced to an exceptional sentence below the bottom of the standard range. Nevertheless, the Commissioner ordered the State to obtain a corrected judgment and sentence and file it with the Supreme Court before he would issue a final order of dismissal. CP 39-41.

While the State was attempting to procure the corrected judgment and sentence, it was discovered for the first time that the original judgment and sentence was predicated upon a miscalculated offender score, which included washed out offenses.

CP 14-41; 1RP 2-3. After investigating the matter, the parties agreed Wells offender score was 4 (not six) and his standard range was 12-16 (not 22- 29) months for counts 1 and 3 and was 2-8 (not 12-14) months for count 2. 1RP 2, 21; CP 62.

On June 4, 2012, the parties met before the trial court for resentencing. 1RP 2-24. The trial court made the necessary substantive changes to the judgment and sentence to reflect the newly agreed offender score and standard ranges. 1RP 21-23; CP 50-59. After it did so, the judgment and sentence revealed for the first time that Wells did not receive an exceptional sentence downward on any count, and that he actually received an exceptional sentence upward for count 2. CP 50-59. Recognizing this, Wells was concerned about officially agreeing to the corrected judgment and sentence because it now exposed that he had been misinformed about his offender score when he pled guilty. 1RP 3-4, 7-16. The trial court decided to enter the corrected judgment and sentence with Wells' objection noted and to permit Wells to file a new motion to withdraw his plea. 2RP 17.

On June 5, 2012, Wells filed a pro se Motion to Withdraw Plea in Skagit County Superior Court. He explained that the new judgment and sentence taken with the plea documents showed he

had been misinformed of his offender score. Wells argued this resulted in an involuntary plea and showed that he had been denied the benefit of his plea bargain because he did not receive any exceptional sentence downward. CP 59-96.

Meanwhile, the State submitted the corrected judgment and sentence to the Washington Supreme Court. On June 7, 2012, the Commissioner found that the condition it had previously set had been met and dismissed Wells' PRP. The Commissioner did not address the substantive changes that were made and, instead, reiterated his previous analysis, concluding: "As noted, I directed the state to obtain a corrected judgment and sentence. Mr. Wells does not show that the corrections were not made." Appendix A ("Ruling Dismissing Personal Restraint Petition").

On June 14, 2012, the Skagit County Superior Court held a hearing on Wells' Motion to Withdraw. 2RP. The prosecutor argued the motion was time-barred, citing the Supreme Court's order dismissing Wells' PRP. 2RP 2-3. Wells pointed out that the Supreme Court did not have the benefit of evaluating the new issues brought about by the substantive changes made to the judgment and sentence, because they had not been exposed when the Commissioner entered his conditional ruling. 2RP 4-6, 8-9.

The trial court disagreed, concluded the new motion was time-barred under RCW 10.73.090, and transferred it to the Court of Appeals pursuant to CrR 7.8(c)(2). 2RP 8-9. Wells promptly filed a Notice of Appeal seeking review of the trial court's decision to transfer his motion to withdraw his plea. CP 109.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT TRANSFERRED WELLS' MOTION TO THIS COURT PURSUANT TO CrR 7.8(c)(2).

Appellant's motion to withdraw his plea is not time-barred under RCW 10.73.090 because: (1) it was filed just one day after the final judgment and sentence was entered; and (2) the final judgment and sentence is facially invalid. Thus, the trial court erred when it transferred the motion to this Court to be considered as a PRP.

CrR 7.8 sets forth the procedure by which a defendant may obtain relief from judgment. Specifically, CrR 7.8(c)(2) provides:

The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

In other words, if the motion is timely and appears to have merit or requires a factual hearing, the superior court should retain the matter.

In this case, the trial court's decision to transfer the case rested entirely on its finding that Wells' challenge was time-barred under RCW 10.73.090. However, as shown below, the motion was not time-barred and has merit.

First, Wells' motion is not time-barred because his judgment and Sentence only became "final" the day before Wells filed his motion. RCW 10.73.090 provides:

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

Emphasis added. For purposes of this statute, a Judgment is considered "final" as of latest date it is filed with a trial court clerk, the date of mandate from an appellate court disposing of timely direct appeal, or the date that United States Supreme Court denies certiorari to review a decision affirming conviction on direct appeal. RCW 10.73.090(3).

In his motion to withdraw his plea, Wells challenged a judgment and sentence that was filed with the trial court clerk on June 4, 2012. 2RP 4-10; CP 50, 59-64. Under RCW 10.73.090(3), the judgment was rendered “final” on that day, which was just one day before Wells filed his motion. CP 59. Thus, he was well within the one-year time limit set forth in RCW 10.73.090.

In response, the State may argue that on June 4, 2012, the trial court merely made “technical” corrections to an otherwise final judgment and sentence. However, Washington case law does not support this argument.

A “technical” correction is one that has no actual effect on the rights of the defendant. In re Pers. Restraint of McKiernan, 165 Wn.2d 777, 783, 203 P.3d 375 (2009). Where an error in a defendant's offender score affects the applicable sentencing range, however, the defendant's rights are affected and resentencing is required. State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009) (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002)). In such cases, the trial court has the power and duty to exercise independent judgment and correct the erroneous sentence. Id.

In this case, the trial court exercised its independent judgment and made substantive changes to the judgment and sentence when it entered Wells' offender score and correct sentencing ranges. These substantive changes had an actual effect on Wells' right to be given a sentence within the standard range authorized by statute. In re Pers. Restraint of Tobin, 165 Wn.2d 172, 176, 196 P.3d 670 (2008) (holding judgment and sentence invalid where the trial judge imposed a longer sentence than that authorized by statute). Thus, the corrections made by the trial court on June 4, 2012, were not merely "technical;" instead, those corrections constituted an exercise of the trial court's discretion and authority that had a substantive impact on Wells' rights. See, e.g., In re Coats, 173 Wn.2d 123, 135-36, 267 P.3d 324 (2011) (reviewing prior case law to illustrate the difference between technical errors and substantive errors).

Moreover, the record clearly shows the trial court understood it was not merely making technical corrections. When the trial judge signed the corrected judgment and sentence, he considered on the record whether he should sign it "nunc pro tunc." 1RP 23. He concluded, however, that was not appropriate given the changes that were made. Id. This demonstrates the trial court

recognized it was not merely making technical corrections to Wells' original judgment and sentence to reflect what actually occurred previously; instead, the trial court was making substantive changes that impacted the finality of the sentence.

Wells' motion is also not time-barred because the corrected judgment and sentence is invalid on its face. RCW 10.73.090's one-year time bar on collateral challenges does not apply if the judgment and sentence is "invalid." Coats, 173 Wn.2d at 135. Here, the judgment and sentence is invalid because it, along with the plea documents, show the trial court exceeded its sentencing authority.

A court exceeds its authority when it orders a sentence beyond that authorized by law. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Any such order is invalid on its face. Tobin, 165 Wn.2d at 176 (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866–67, 50 P.3d 618 (2002)).

Here, Wells' standard range for Court 2 was 3 to 8 months. CP 52. There are no findings supporting an exceptional sentence upward. CP 54. Yet, Wells was sentenced to 12 months plus a day on all counts. CP 54. Thus, this sentence exceeded the statutory maximum and the trial court's authority. See, RCW

9.94A.535 (authorizing an exceptional sentence only after the trial court finds “substantial and compelling reasons justifying an exceptional sentence”).

Additionally, the new judgment and sentence, taken together with the plea documents, shows the trial court imposed a sentence based on a miscalculated offender score. Although the new judgment and sentence reflects the correct offender score, it also contains specific findings that there were substantial and compelling reasons to sentence Wells below the standard range for counts 1 and 3. CP 52, 81. Despite these findings, the corrected judgment and sentence imposed a standard range sentence for all offenses. CP 52, 54. As the plea and sentencing documents show, the only reason for this is that the trial court imposed a sentence based on the originally miscalculated offender score, not on the newly determined offender score. CP 52-54, 66, 81. As such, the trial court exceeded its authority. See, In re Pers. Restraint of LaChapelle, 153 Wn.2d 1, 6, 100 P.3d 805 (2004) (holding judgment and sentence was invalid because the trial judge had miscalculated the offender score and sentenced the offender based on a washed out prior offense).

Finally, the trial court erred when it relied on the Washington Supreme Court's dismissal of Wells' prior PRP as a reason to find his new motion was time-barred. 2RP 8. Although the trial court was correct that the Commissioner concluded that the mere correction of technical errors in Wells' sentence did not provide grounds for avoiding RCW 10.73.090's time-bar, a careful reading of the Commissioner's final ruling reveals he limited the scope his final review to making sure the technical flaws he had previously identified had been corrected. Appendix A at 3.

First, the Commissioner re-emphasized his prior finding that the judgment and sentence being reviewed for Wells' PRP only contained technical errors. He specifically stated: "As I explained, the flaws on the face of the judgment and sentence had no actual effect on Wells' rights in light of his lenient sentence." Appendix A at 2. Had the Commissioner reviewed the substantive changes that were made to the corrected judgment and sentence, he could not have concluded that Wells received a "lenient" sentence given the fact that Wells was sentenced within the standard range for two counts and was given an exception sentence upward for the other count. Hence, his characterization of Wells' sentence as "lenient"

strongly suggests the Commissioner did not review the substantive changes made to the corrected judgment and sentence.

Second, the parameters of the Commissioner's review are reflected in this statement: "As noted, I directed the state to obtain a corrected judgment and sentence. Mr. Wells does not show that the corrections were not made." Appendix A at 3. After the State obtained a judgment and sentence that showed the technical corrections had been made, the Commissioner's denial was triggered by that fact alone. Appendix A at 2-3. Consequently, his ruling that Wells' prior PRP was time-barred did not contemplate the effect of the substantive changes that are at issue in Wells' new motion.

Finally, the footnote relied upon by the trial court (2RP 8) also demonstrates that, for purposes of the time bar, the scope of the Commissioner's final review was limited to a determination of whether the technical errors had been corrected. Specifically, the Commissioner stated: "Mr. Wells fails to show how **corrections of technical flaws** affects the finality of his judgment and sentences for purposes of RCW 10.73.909(1)." Appendix A at 3, n.2 (emphasis added). By its plain language, this sentence does not speak to whether Wells' motion, which is predicated upon the

substantive changes made to his judgment and sentence, was time-barred under RCW 10.73.090. Consequently, the trial court erred when it relied on this language as a basis for concluding Wells' motion was time-barred.

Finally, under CrR 7.8(c)(2), Wells also has to show that his motion has merit or that a factual hearing is required. This requirement has been met. As this Court's decision addressing Wells' miscalculated offender score in his San Juan Island County case demonstrates, Wells' arguments do have merit and a factual hearing will be necessary to determine the appropriate remedy. CP 19-32. As such, all the conditions necessary to have his motion heard below have been met.

In summary, the trial court erred when it transferred Wells' motion to this Court pursuant to CrR 7.8(c)(2). First, Wells' motion to withdraw his plea was not time-barred because the judgment and sentence was not final until June 4, 2012, and he filed his motion one day later. Additionally, the judgment and sentence is facially invalid because it contains a sentence that is beyond the standard range and because it makes the necessary findings supporting two downward departing exceptional sentences, but it fails to reflect this in its actual sentence. Second, Wells' motion to withdraw his plea

has merit and its resolution requires a factual hearing. Hence, the trial court's decision to transfer Wells' motion under CrR 7.8(c)(2) is unsupported by the record, and this Court should remand for a show-cause hearing pursuant to CrR 7.8(c)(3).

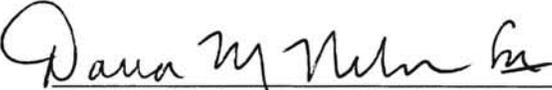
D. CONCLUSION

Appellant respectfully asks this Court to reverse the trial court's order transferring this motion as a PRP and to remand for further proceedings.

Dated this 14<sup>th</sup> day of January, 2013.

Respectfully submitted

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# APPENDIX A

THE SUPREME COURT  
STATE OF WASHINGTON

RONALD R. CARPENTER  
SUPREME COURT CLERK

SUSAN L. CARLSON  
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June 7, 2012

Rayne Dee Wells, Jr.  
#87546  
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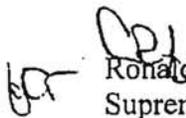
Erik Pedersen  
Skagit County Prosecutor  
605 S. 3rd Street  
Mount Vernon, WA 98273-3867

Re: Supreme Court No. 86706-2 - Personal Restraint Petition of Rayne Dee Wells, Jr.

Counsel and Mr. Wells:

Enclosed is a copy of the RULING DISMISSING PERSONAL RESTRAINT PETITION signed by the Supreme Court Commissioner, Steven Goff, on June 7, 2012, in the above entitled cause.

Sincerely,

  
Ronald R. Carpenter  
Supreme Court Clerk

RRC: daf

Enclosure

2012 JUN 11 PM 12:06  
SKAGIT COUNTY  
PROSECUTING ATTORNEY

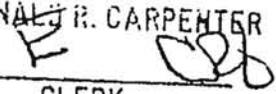
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SUPREME COURT  
STATE OF WASHINGTON

12 JUN -7 PM 1:21

BY RONALD R. CARPENTER

  
CLERK

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

In the Matter of the Personal Restraint of:  
RAYNE DEE WELLS, JR.,  
Petitioner.

NO. 86706-2

RULING DISMISSING PERSONAL  
RESTRAINT PETITION

Rayne Wells pleaded guilty in 2000 to second degree unlawful possession of a firearm, second degree malicious mischief, and second degree escape. The trial court imposed an exceptional sentence below the standard range of 12 months and one day. But the judgment and sentence listed a conviction for *first* degree unlawful possession of a firearm. Mr. Wells did not appeal. In 2009 he filed a motion in the superior court to withdraw his pleas, which the court transferred to Division One of the Court of Appeals for treatment as a personal restraint petition. CrR 7.8(c)(2). The acting chief judge dismissed the petition, and I conditionally denied discretionary review in a ruling entered on March 16, 2012, directing the State to obtain a corrected judgment and sentence to remedy technical flaws. No. 86225-7. Mr. Wells did not move to modify that ruling. In November 2011 Mr. Wells filed another personal restraint petition directly in this court. Now before me for determination is whether to dismiss the petition or refer it to the court for a decision on the merits. RAP 16.5(b);

RAP 16.11(b).

637/158

Because Mr. Wells filed his current petition more than one year after his judgment and sentence became final, the petition is untimely unless the judgment and sentence is facially invalid or was entered without competent jurisdiction, or unless Mr. Wells raises solely grounds for relief exempt from the time limit under RCW 10.73.100; *In re Pers. Restraint of McKiearnan*, 165 Wn.2d 777, 781, 203 P.3d 375 (2009). Mr. Wells contends that the superior court lacked jurisdiction because the juvenile division of that court retained jurisdiction past his 18th birthday. But I rejected that argument on the merits in my ruling on Mr. Wells's first collateral challenge. As explained there, Mr. Wells was originally charged in juvenile court with the firearm and malicious mischief counts. He was charged with second degree escape after his 18th birthday. At his plea and sentencing hearing, Mr. Wells stipulated to a decline of juvenile jurisdiction. A previously entered juvenile court form purporting to extend juvenile jurisdiction past Mr. Wells's 18th birthday failed to set forth statutorily mandated findings and was therefore ineffective for purposes of extending juvenile court jurisdiction. RCW 13.40.300(1)(a); *In re Pers. Restraint of Morris*, 19 Wn. App. 613, 615, 576 P.2d 1333 (1978). The trial court thus had competent jurisdiction. Mr. Wells fails to demonstrate good cause for raising this issue again. RAP 16.4(d); *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 566-67, 933 P.2d 1019 (1997).<sup>1</sup>

Mr. Wells also argues that his judgment and sentence is facially invalid. RCW 10.73.090(1). That argument was also rejected in Mr. Wells's earlier petition. As I explained, the flaws on the face of the judgment and sentence had no actual effect on Mr. Wells's rights in light of his lenient sentence. *See McKiearnan*, 165 Wn.2d at 783. Such technical flaws did not render the judgment and sentence

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<sup>1</sup> The State contends that Mr. Wells's petition is improperly successive under RCW 10.73.140. But that provision applies to the Court of Appeals, not to the Supreme Court. *State v. Brown*, 154 Wn.2d 787, 794, 117 P.3d 336 (2005).

“invalid” for purposes of escaping the time bar on collateral attack. *See In re Pers. Restraint of Coats*, 173 Wn.2d 123, 143, 267 P.3d 324 (2011) (misstatement of maximum sentence did not render otherwise valid standard-range sentence facially invalid). As noted, I directed the State to obtain a corrected judgment and sentence. Mr. Wells does not show that the corrections were not made.

Finally, Mr. Wells contends that his guilty plea was involuntary because of errors in the judgment and sentence, and that defense counsel was ineffective. But neither of those claims is exempt from the time limit under RCW 10.73.100. *See In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 349, 5 P.3d 1240 (2000). Mr. Wells’s petition is thus time barred.

The personal restraint petition is dismissed.<sup>2</sup>



COMMISSIONER

June 7, 2012

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<sup>2</sup> On June 6, 2012, Mr. Wells moved to stay his current petition pending correction of his judgment and sentence in light of my ruling in No. 86225-7. Mr. Wells fails to show how correction of technical flaws affects the finality of his judgment and sentence for purposes of RCW 10.73.090(1). *See State v. Kilgore*, 167 Wn.2d 28, 41, 216 P.3d 393 (2009) (judgment remained final where trial court did not exercise independent judgment on remand). And he fails to show how correction of his judgment and sentence raises exempt grounds for relief. The motion for stay is denied.

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68935-5-1
	)	
RAYNE WELLS,	)	
	)	
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 14<sup>TH</sup> DAY OF JANUARY 2013, 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 AND/OR VIA EMAIL.

- [X] SKAGIT COUNTY PROSECUTOR'S OFFICE  
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- [X] RAYNE WELLS, JR.  
DOC NO. 819131  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 14<sup>TH</sup> DAY OF JANUARY 2013.

X *Patrick Mayovsky*

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