

70294-7

70294-7

NO. 70294-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JOSE SOCORRO BAUTISTA,

Appellant.

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 APR 22 PM 1:20

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The superior court was without jurisdiction to accept Mr. Socorro Bautista's change of plea where the record fails to establish his waiver of the right to an elected judicial officer was knowing, intelligent and voluntary.

2. The trial court erred in accepting Mr. Socorro Bautista's waiver of rights and change of plea in the absence of a complete translation of the crucial legal forms rather than merely an interpretation of his attorney's explanation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Washington defendants have a constitutional right to an elected judicial officer presiding at trial and change of plea hearings. Any waiver of that right must be informed and voluntary. Mr. Sacorro Bautista appears to have signed a stipulation form but there is no evidence it was translated for him or that he was otherwise informed of his rights in a manner he could understand prior to entering into the stipulation. In the absence of valid and informed consent for the pro tem, is his guilty plea void for lack of jurisdiction?

2. In a criminal case, non-English speaking defendants have the right to an interpreter, derived from the Sixth Amendment right to

confront witnesses, have a fair trial, and be present at one's own trial. This right is also codified by statute in order to ensure understanding through the process. Such understanding cannot be achieved in the context of a guilty plea, however, without full and complete translation of the critical documents. Where Mr. Socorro Bautista only received a Spanish language interpretation of defense counsel's synopsis, does the record establish a manifest constitutional violation?

C. STATEMENT OF THE CASE.

Mr. Socorro Bautista was charged by information filed in King County Superior Court with two counts of violating RCW 9A.44.073 (first degree rape of a child) and one count of violating RCW 9A.44.083 (first degree child molestation). CP 1-8. The information was subsequently amended to add another count under RCW 9A.44.083. CP 9-11.

On March 4, 2013, before Commissioner Kenneth Comstock, sitting as a judge pro tem, Mr. Socorro Bautista waived his trial rights and entered a plea of guilty to a single count of violating RCW 9A.44.073 in exchange for the prosecutor's dismissal of the remaining charges and recommendation of a 103-month sentence. CP 12-38. According to his statement on the change of plea form, Mr. Socorro

Bautista maintained that he was not guilty of the offense, but chose to plead guilty to take advantage of the prosecutor's plea offer. CP 24.

Mr. Socorro Bautista was subsequently sentenced to a term of incarceration within the standard range. 4/5/13RP 2-16; CP 39-49.

Notice of Appeal was then timely filed. CP 50-51.

D. ARGUMENT.

**1. The superior court did not have jurisdiction to accept appellant's change of plea in the absence of valid and informed consent to the use of a judge pro tem.**

a. Mr. Socorro Bautista's change of plea and associated waivers occurred before a judge pro tem.

Defendants in Washington have a right under article IV, section 5 of the Washington Constitution to have their cases heard in a court presided over by an elected superior court judge. State v. Sain, 34 Wn.App. 553, 557, 663 P.2d 493 (1983). This right extends to hearings involving the entry of a guilty plea. State v. Duran-Madrigal, 163 Wn.App. 608, 612, 261 P.3d 194, review denied 173 Wn.2d 1015 (2011).

Mr. Socorro Bautista appeared in King County Superior Court before Commissioner Kenneth Comstock on March 4, 2013, at which time a change of plea was entered. In the context of the hearing, he purportedly waived his rights to jury trial, confront witnesses and present a defense,

among others. RP 3-14. Mr. Socorro Bautista contends on appeal that his consent to the pro tem was invalid and the proceedings void absent a record that his stipulation was translated and his rights explained in a manner he could fully understand.

b. Guilty pleas require an elected judge or proper consent for a judge pro tem.

The acceptance of a guilty plea involves judicial examination of legal and factual issues, and in doing so, the court determines whether the defendant is knowingly, intelligently, and voluntarily entering the plea and whether there is a factual basis for the plea. State v. Duran-Madrigal, 163 Wn.App. at 612. These are fundamental judicial functions and, therefore, acceptance of a guilty plea falls within a pro tempore judge's "authority to try" a case, as provided by Article 4, section 7 of the Washington Constitution<sup>1</sup> and RCW 2.08.180.<sup>2</sup> Id.; Nelson v. Seattle Traction Co., 25 Wash. 602, 603-04, 66 P. 61 (1901).

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<sup>1</sup> Washington Constitution, Article 4, section 7, provides in pertinent part:

... A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition

Where a judge pro tem is utilized, consent of the parties is an essential requirement for valid appointment of the judge pro tempore. Mitchell v. Kitsap County, 59 Wn.App. 177, 181, 797 P.2d 516 (1990) citing Burton v. Ascol, 105 Wn.2d 344, 351, 715 P.2d 110 (1986). That consent must be given in writing or orally in open court. In re Dependency of K.N.J., 171 Wn.2d 568, 578, 257 P.3d 522 (2011); National Bank of Washington, Coffman-Dobson Branch v. McCrillis, 15 Wn.2d 345, 356, 130 P.2d 901(1942) (agreement by parties to appointment of special judge is jurisdictional requirement which is not waived by allowing default or making general appearance).

The requirement that parties consent to a judge pro tem is jurisdictional. State v. Belgarde, 119 Wn.2d 711, 719, 837 P.2d 599 (1992). The explicit requirement of Article 4, section 7 and RCW 2.08.180 that the parties agree in writing or in open court to try a case before a pro

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to any other right provided by law. ...

AMENDMENT 94, 2001 Engrossed Senate Joint Resolution No. 8208, p 2327.  
Approved November 6, 2001.

<sup>2</sup> RCW 2.08.180 provides in pertinent part:

A case in the superior court of any county may be tried by a judge pro tempore, who must be either: (1) A member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; or (2) pursuant to supreme court rule, any sitting elected judge. Any action in the trial of such cause shall have the same effect as if it was made by a judge of such court.

tempore judge is an essential element to the jurisdiction of such judge and a lack of consent can be raised at any time. State v. McNairy, 20 Wn.App. 438, 440, 580 P.2d 650 (1978) (acquiescence in the presence of a pro tempore judge under the mistaken belief that he is a visiting judge does not constitute consent). In the absence of a record of Mr. Socorro Bautista's informed consent to have the matter heard by a pro tem, the superior court was without jurisdiction to enter the change of plea.

c. Mr. Socorro Bautista's consent below was not valid.

As noted already, defendants have a substantive right to have their cases tried in court presided over by an elected superior court judge accountable to the electorate, rather than by a judge pro tem. Mitchell, 59 Wn.App. at 184. That right could not be waived by defense counsel's unauthorized acquiescence or signing of a consent stipulation in the absence of the accused's knowing agreement. Sain, 34 Wn.App. at 557. An attorney is without authority to surrender a substantial right of a client unless the client grants the specific authority to do so. Mitchell, 59 Wn.App. at 184, quoting In re Marriage of Maxfield, 47 Wn.App. 699, 707, 737 P.2d 671 (1987).

The waiver of this substantive right to an elected judge, like the waiver of the right to jury trial, must not be implied. Rather, the consent

must be affirmative, voluntary, knowing, intelligent and on the record. See e.g. Abad v. Cozza, 128 Wn.2d 575, 583, 911 P.2d 376 (1996); City of Bellevue v. Acrey, 103 Wn.2d 203, 207-08, 691 P.2d 957 (1984). By way of comparison, when parties enter into arbitration agreements, the corresponding jury trial waivers ““must be voluntary, knowing, and intelligent,”” and no less can be true in a criminal proceeding. Godfrey v. Hartford Casualty Insurance Co., 142 Wn.2d 885, 898, 16 P.3d 617 (2001) (quoting Acrey, 103 Wn.2d at 207).

The Legislature in Washington specifically provides for interpreters to help secure these rights for non-English speakers because those who are unable to readily understand or communicate in the English language cannot otherwise be fully protected in legal proceedings. RCW 2.43.010.

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

Id. The Legislature has, therefore, explicitly indicated a desire to ensure non-English speaking persons are afforded the full protection of the law and that must certainly include the right to an elected judge.

Under RCW 2.43.030, an interpreter must be appointed unless there is a written waiver by the non-English-speaking person. Here the record fails to indicate that Mr. Socorro Bautista was provided these services in the context of the waiver of his right to an elected judicial officer. The stipulation contains no indication it was translated, interpreted or otherwise explained to Mr. Socorro Bautista. The colloquy surrounding the change of plea also contains no indication that the significance of this waiver and the substantive rights associated to it, was provided to Mr. Socorro Bautista. 3/4/13RP 2-14.<sup>3</sup>

The record established that Mr. Socorro Bautista had only six years of formal education and that even with the help of an interpreter he had considerable difficulty understanding the process and rights he was waiving. See 3/4/13RP 4, 6-10. As a result, the record fails to establish compliance with RCW 2.43.030 and fails to establish a knowing and voluntary waiver of the substantive right to an elected judge at the plea hearing. Without the parties' knowing and voluntary consent, the judge pro tempore lacked jurisdiction. State v. Belgarde, 62 Wn.App. 684, 815 P.2d 812 (1991), affirmed 119 Wn.2d 711, 837 P.2d 599, cert. denied 529 U.S. 1091.

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<sup>3</sup> The Stipulation, Oath and Order Appointing Judge Pro Tempore (Sub no 54B) has been separately designated and is attached hereto as Appendix A for the Court's

Sain holds that while an attorney is impliedly authorized to waive procedural matters, a client's substantial rights may not be waived without that client's consent. 34 Wn.App. at 557; see also Graves v. P.J. Taggares Co., 94 Wn.2d 298, 303, 616 P.2d 1223 (1980); In re Adoption of Coggins, 13 Wn.App. 736, 537 P.2d 287 (1975).<sup>5</sup>

d. Absent valid consent, the proceedings below were void.

If a party has not consented to the appointment of a judge pro tempore, the appointed pro tempore judge lacks jurisdiction; without jurisdiction, the entire proceedings before the judge pro tempore are void. Mitchell, 59 Wn.App. at 181-84.

**2. Appellant's change of plea was not knowing and voluntary in the absence of a complete translation of the change of plea form at the time**

a. Mr. Socorro Bautista did not receive complete translations of the critical plea documents.

At the change of plea hearing, Mr. Socorro Bautista was assisted by a certified Spanish interpreter. 3/4/13RP 2. He indicated he

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reference.

<sup>5</sup> Two intervening Court of Appeals opinions held an attorney's "general authority to try the case" authorizes him or her to stipulate to a judge pro tempore on behalf of the client. State v. Robinson, 64 Wn.App. 201, 825 P.2d 738 (1992); State v. Osloond, 60 Wn.App. 584, 805 P.2d 263 (1991). The unique procedural posture of those cases and the failure to appreciate the substantive nature of the rights make the holdings inapplicable in this case. To the extent they are not distinguishable, the holdings were wrong, harmful and should be rejected.

had only six years of formal education. 3/4/13RP 4. In response to Commissioner Comstock's questions, Mr. Socorro Bautista indicated through the interpreter that his attorneys and the interpreter had gone "through this document together" and that his attorneys had answered "most" of his questions about the document. 3/4/13RP 3.

Mr. Socorro Bautista indicated he understood what the State said he did and that he was giving up his right to make the State prove the charge beyond a reasonable doubt at trial. Id. The commissioner then asked:

Do you understand that you have a right to a speedy and public trial; that you have the right to remain silent before and during trial, no one could ever make you testify against yourself, you would have the right to hear and question any witnesses that would come in on behalf of the State to testify against you; you could bring in people to testify for you, if there was anyone, and that could be done at no charge to you; you'd be presumed innocent until the charge is proven beyond a reasonable doubt at trial or until you enter a plea of guilty – which is why we're here today, to see if you wish to do that – if you chose to go to trial and you were found guilty, you'd have the right to appeal that finding to a higher Court. Do you understand all those rights?

THE DEFENDANT (through the Interpreter): Not a hundred percent, but I do understand them.

3/4/13RP 5-6. Commissioner Comstock then reviewed the trial rights again individually and asked:

So do you understand that after all of the negotiations and so on, at least my understanding is, you're choosing to give those rights up and to enter a plea of guilty to one count or one charge here today. Do you understand that?

THE DEFENDANT (through the Interpreter): Yes.

THE COURT: And is that what you wish to do?

THE DEFENDANT (through the Interpreter): I'll do it.

3/4/13RP 7. The court then reviewed the maximum sentence, persistent offender implications, and the prosecutor's sentencing recommendation, although Mr. Socorro Bautista indicated his confusion in several areas. 3/4/13RP 7-10.

Commissioner Comstock ultimately found that Mr. Socorro Bautista "entered into the plea freely and voluntarily with full knowledge of the consequences." 3/4/13RP 13. Mr. Socorro Bautista contends on appeal that this was not true and he is entitled to relief.

- b. A guilty plea requires a knowing and intelligent waiver of the rights.

Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); In re Montoya, 109 Wn.2d 270,

277, 744 P.2d 340 (1987). The record must affirmatively show that the guilty plea was made intelligently and voluntarily with an understanding of the full consequences of the plea. Wood v. Morris, 87 Wn.2d 501, 503, 554 P.2d 1032 (1976). To qualify as a knowing and intelligent plea, a guilty plea must be made with a correct understanding of the charge and the consequences of pleading guilty. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. at 242); In re Pers. Restraint of Quinn, 154 Wn.App. 816, 835, 226 P.3d 208 (2010).

Furthermore, CrR 4.2 provides:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996) (quoting CrR 4.2(d)); *see also* RCW 9.94A.431.

In order to ensure the voluntary and knowing waiver of these rights, a non-English speaking defendant in a criminal case is entitled to have an interpreter and this right is codified in RCW 2.43.010. State v. Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999) (interpreters are necessary to protect the Sixth Amendment right to confront witnesses,

have a fair trial, and be present at one's own trial). A defendant has a constitutional right to "a competent interpreter." State v. Serrano, 95 Wn.App. 700, 704, 977 P.2d 47 (1999).

Appellate review of the validity of a guilty plea is de novo. Young v. Konz, 91 Wn.2d 532, 536, 588 P.2d 1360 (1979). The State bears the burden of proving the validity of a guilty plea from the record or by clear and convincing extrinsic evidence. State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996).<sup>7</sup>

c. Full and complete translation of the plea form was required to ensure a knowing and intelligent waiver.

The right to be present and consult with counsel presumes that a defendant will be informed about the proceedings so he can assist in his own defense.

[I]f the right to be present is to have meaning [it is imperative that every criminal defendant] possess 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'

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<sup>7</sup> A defendant is allowed to withdraw a guilty plea if necessary to correct a manifest injustice. CrR 4.2(f). "Manifest injustice" is defined as "an injustice that is obvious, directly observable, overt, not obscure." State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). An involuntary plea is a manifest injustice. Taylor, 83 Wn.2d at 597.

United States ex rel. Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970) (due process requires INS furnish an alien faced with deportation with “an accurate and complete translation of official proceedings), *quoting* Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (vacating murder conviction where interpreter provided defendant with summaries rather than verbatim account of the proceedings). “Translations of critical documents are much more than a convenience.” United State v. Mosquera, 816 F.Supp. 168, 173 (E.D.N.Y. 1993) (holding that where defendants plead guilty complete translations of critical documents including written plea agreement was required).

Courts must ensure that “every defendant stand[s] equal before the law.” Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). “For a non-English speaking defendant to stand equal with others before the court requires translation.” Mosquera, 816 F.Supp. at 174; U.S. Const. amend XIV. As the district court explained:

Just as summaries of testimony were inadequate in United State ex. Rel. Negron v. State of New York, 434 F.2d 386, 390 (2d Cir. 1970), so too is an interpreter’s oral description of the contents of a critical document insufficient.

Mosquera, 816 F.Supp. at 175. The distinction is significant because:

Oral interpretation and written translations serve different purposes. While an oral interpretation can provide

momentary understanding of representations contained in a document, a criminal defendant may need and want to review the document alone and with others to achieve full understanding.... Without written translations, they would have to rely on their memory of an oral interpretation that occurred under circumstances where they might feel ill-at-ease and have difficulty concentrating.

Id.

- d. Involuntariness of a guilty plea is the type of constitutional error that a defendant can raise for the first time on appeal.

Mr. Socorro Bautista asks this Court to find that in the absence of a complete translation of the change of plea form, due process has not been satisfied and the reversal is required. Where a complete word-for-word translation is not provided, some courts have held that the reviewing court must determine whether the translation was adequate to accomplish the task. See United State v. Lim, 794 F.2d 469, 470 (9<sup>th</sup> Cir.), cert denied sub nom., Ahn v. United States, 479 U.S. 937 (1986) (upholding the limited use of interpreters to assist other witnesses). Mosquera concludes that it is not sufficient and the result is a manifest constitutional error. State v. Walsh, 143 Wn.2d 1, 6-9, 17 P.3d 591 (2001); State v. Contreras, 92 Wn.App. 307, 313, 966 P.2d 915 (1998).

E. CONCLUSION.

For the reasons stated herein, Mr. Socorro Bautista requests this Court find the superior court was without jurisdiction in the absence of a knowing and intelligent waiver of the right to an elected judge at the change of plea hearing. Furthermore, that his change of plea and waiver of rights was not made knowingly and intelligently. The case should, therefore, be remanded to the superior court for further proceedings as appropriate.

DATED this \_\_ day of April 2014.

Respectfully submitted,



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DAVID L. DONNAN (WSBA 19271)  
Washington Appellate Project (91052)  
Attorneys for Appellant

**FILED**  
KING COUNTY, WASHINGTON

MAR 04 2013

SUPERIOR COURT CLERK  
BY ANNIE JOHNSON  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON  
Plaintiff,

NO. 12-1-09662-6 sea

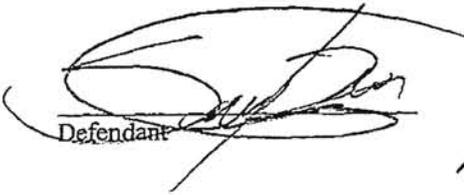
vs.

STIPULATION, OATH AND ORDER  
APPOINTING JUDGE PRO TEMPORE

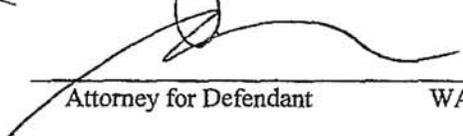
Bautista, Jose  
Defendant

I. STIPULATION

IT IS HEREBY AGREED that KENNETH COMSTOCK, member of the bar of the State of Washington, shall try and determine the above entitled cause and that his/her action in the trial and subsequent proceedings have the same effect as if he/she were a judge of said court.

  
Defendant

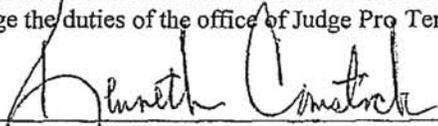
  
Attorney for Plaintiff WA Bar Number 35884 03/04/13

  
Attorney for Defendant WA Bar Number 91994 03/04/13

II. OATH

STATE OF WASHINGTON )  
                                  ) ss.  
COUNTY OF KING     )

I, the undersigned, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Washington, and that I will faithfully discharge the duties of the office of Judge Pro Tempore in the above-entitled cause according to the best of my ability.

  
Appointed Judge Pro Tempore

III. ORDER

I, HEREBY MAKE AND APPROVE the appointment of KENNETH COMSTOCK as Judge Pro Tempore in the above - entitled cause.

Dated: 3/4/13

Presiding Judge   
RICHARD McDERMOTT

Stipulation, Oath and Order Appointing Judge Pro Tempore (SOAJPT) SC Form Jo-139Stip 3/01

APPENDIX

54B

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70294-7-I
v.	)	
	)	
JOSE SOCORRO BAUTISTA,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21<sup>ST</sup> DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> JOSE SOCORRO BAUTISTA 364525 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF APRIL, 2014.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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