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NOV 12 2013
King County Prosecutor
Appellate Unit

70441-9

NO. 70441-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN CARTER,

Appellant.

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

The Honorable Mariane Spearman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's state and federal jury trial rights by imposing an exceptional minimum term based on a judicial finding the standard range was “clearly too lenient.”

2. The State’s failure to provide notice of the intent to seek an exceptional sentence before trial violated the Sentencing Reform Act (SRA) and the appellant’s right to due process.

Issues Pertaining to Assignments of Error

1. In Alleyne v. United States,¹ the Supreme Court held any fact that increases a mandatory minimum term increases the penalty for a crime, and thus must be found by a jury. In doing so, the Court overruled the line of cases relied on by the state Supreme Court to uphold such judicial fact-finding in the context of sentences under RCW 9.94A.507 and its predecessor statute, RCW 9.94A.712.

In light of the decision in Alleyne, did the trial court err in entering an exceptional sentence based on the court’s finding the standard range minimum sentence was “clearly too lenient”?

2. The statute providing for empanelment of a jury on remand does not apply to the aggravating circumstance the trial court found.

¹ Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 2155, 186 L.Ed.2d 314 (2013).

Moreover, the State did not give notice of intent to seek an exceptional sentence until after trial, in violation of the appellant's statutory and due process rights.

Is the remedy therefore remand for resentencing within the standard range?

B. STATEMENT OF THE CASE²

The State charged John Carter with first degree rape and first degree kidnapping and alleged he was armed with a deadly weapon during commission of each crime. CP 1-2. Nearly two and a half years later, a jury convicted Carter of first degree rape and the lesser degree offense of second degree kidnapping. The jury found Carter was not armed with a deadly weapon during commission of the offenses. CP 201-08.

After the verdicts but before sentencing, the State notified Carter of its intent to seek an exceptional sentence upward. Supp. CP ___ (sub no. 164, Notice of Intent to Seek Exceptional Sentence). The prosecutor had apparently intended to argue Carter was eligible for life imprisonment

² The brief refers to the verbatim reports as follows: 1RP – 11/6/12; 2RP – 11/13/12; 3RP – 11/20/12; 4RP – 11/27/12; 5RP – 11/28/12; 6RP – 11/29/12; 7RP – 12/3/12; 8RP – 12/4/12; 9RP – 12/5/12; 10RP – 12/6/12; 11RP – 12/10/12; 12RP – 12/11/12; 13RP – 12/12/12 (morning); 14RP – 12/12/12 (afternoon); 15RP – 12/13/12; 16RP – 12/17/12; 17RP – 12/18/12 (closing arguments); 18RP – 12/18/12 (verdicts); and 19RP – 5/17/13.

without possibility of parole as a persistent offender under RCW 9.94A.570. But the State later conceded Carter's 1979 Oregon rape conviction was not comparable to a Washington crime. CP 249. Based on that same Oregon conviction, however, the State argued the court should impose an exceptional sentence under RCW 9.94A.535(2)(b), which provides "[t]he defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter." Supp. CP ___ (sub no. 164, supra).

Over defense objection to judicial fact-finding, the court sentenced Carter to an exceptional minimum sentence of 360 months on the rape count. CP 276; RCW 9.94A.507(3)(c)(i); 19RP 48, 53. The court found the unscored Oregon conviction resulted in a sentence that was "clearly too lenient." Supp. CP ___ (sub no. 187A, Findings of Fact and Conclusions of Law for Exceptional Sentence). The court ran Carter's standard range sentence for kidnapping concurrent to the rape sentence. CP 276, 278.

Carter timely appeals. CP 257.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED CARTER'S RIGHT TO A JURY TRIAL BY IMPOSING AN EXCEPTIONAL SENTENCE BASED ON A JUDICIAL FINDING THAT A SENTENCE WITHIN THE STANDARD RANGE WAS "CLEARLY TOO LENIENT."

a. The right to jury trial is satisfied only when the jury finds all the facts needed to support the sentence the defendant must serve.

The Sixth Amendment guarantees a criminal defendant the right to "a speedy and public trial, by an impartial jury." Article 1, section 21 of the state constitution provides that "[t]he right of trial by jury shall remain inviolate."

In Apprendi v. New Jersey, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Apprendi pleaded guilty to second degree possession of a firearm for an unlawful purpose. That crime carried "a penalty range of 5 to 10 years," id. at 470, which could be increased to "between 10 and 20 years" if the sentencing judge found that the defendant's motivation was racial. Id. at 468-69. The sentencing judge made such a finding and sentenced the defendant to 12 years. Id. at 471.

The question on appeal was whether the finding could be made by the judge, or whether it had to be made by a jury. Answering that it had to be made by a jury, the United States Supreme Court reversed. It held that a legislature cannot constitutionally “remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” *Id.* at 490 (quoting Jones v. U.S., 526 U.S. 227, 252-53, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999)).

In Blakely v. Washington, the Court clarified what it meant by “statutory maximum.” 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Blakely pleaded guilty to kidnapping with a firearm. His standard range was 49 to 53 months, and his statutory maximum term was 10 years. The trial judge imposed an exceptional sentence of 90 months, finding Blakely acted with deliberate cruelty. In light of Apprendi, the new question was whether “the prescribed statutory maximum” for Apprendi purposes was the top of the standard range or the statutory maximum term of 120 months. Reversing, the Court held that “the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose without any additional findings. 542 U.S. at 303-04. Since 53 months was the most the trial judge could have imposed based on the jury's findings, the 90-month term was error.

Before Apprendi and Blakely, the right to jury trial was purportedly satisfied so long as the jury found all the elements of the underlying crime as defined by the legislature. After those cases, however, the right is satisfied only if the jury finds all the facts needed to support the sentence that the defendant actually must serve, whether or not those facts are labeled “elements” of the crime.

- b. The right to a jury applies to enhancements to the minimum term under RCW 9.94A.507.

Carter was sentenced under RCW 9.94A.507(3). That statute applies when a non-persistent offender is sentenced for specified crimes, including first degree rape. RCW 9.94A.507(1)(a)(i). When RCW 9.94A.507(3) applies, it requires the trial court to impose both a “maximum term” and a “minimum term.” The maximum term consists “of the statutory maximum sentence for the offense.” RCW 9.94A.507(3)(b); see also RCW 9A.20.010 (dividing felonies into three classes); RCW 9A.20.020 (setting maximum sentences for each class of felony). The minimum term shall be “within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.” Under RCW 9.94A.535, a sentence outside the standard range must be based on “substantial and compelling reasons” that were not considered

when the standard range was set. State v. Grewe, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991).

When the trial court's standard or exceptional minimum term expires, the Indeterminate Sentence Review Board (ISRB) "shall order the offender released, under such affirmative and other conditions as the board determinates appropriate, unless the board determines . . . that it is more likely than not the offender will commit sex offenses if released. RCW 9.95.420(3)(b). If the ISRB determines the offender is more likely than not to re-offend, it "shall establish a new minimum term, not to exceed an additional five years." RCW 9.95.011(2)(a). If the offender violates the ISRB's conditions while on release, it "may transfer the offender to a more restrictive confinement status to serve up to the remaining portion of the sentence." RCW 9.95.435(1).

Here, the court imposed an exceptional minimum term of 360 months, well above his standard range of 178 to 236 months, finding Carter's prior unscored Oregon felony resulted in a presumptive sentence that was "clearly too lenient." RCW 9.94A.535(2)(b); Supp. CP ___ (sub no. 187A, supra).

Generally speaking, even where the decision is based in part on the fact of a prior conviction,³ whether a standard sentence is “clearly too lenient” is a factual determination for the jury. State v. Saltz, 137 Wn. App. 576, 583-84, 154 P.3d 282 (2007); State v. Hughes, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); cf. State v. Alvarado, 164 Wn.2d 556, 568-69, 563, 192 P.3d 345 (2008) (judicial determination of “free crimes” under RCW 9.94A.535(2)(c) is permissible because determination that some offenses would go unpunished without an exceptional sentence “rests solely on criminal history and calculation of the offender score, without the need for additional fact finding by the jury”).

In Saltz, the State notified Saltz it would seek an exceptional sentence based in part on unscored prior convictions. 137 Wn. App. at 579. Saltz stipulated to his criminal history. Id. at 579-80. The State recommended, and the trial court imposed, a sentence above the standard range. Id. at 580. On appeal, the Court ruled that the Sixth Amendment required a jury to make factual findings to support a conclusion that the standard sentence was “too lenient.” Saltz, 137 Wn. App. at 583-84.

³ Apprendi, 530 U.S. at 590.

Thus, the trial court erred by using criminal history to impose an exceptional sentence without jury findings. Id.

In State v. Clarke, 156 Wn.2d 880, 134 P.3d 188 (2006), however, the state Supreme Court held a trial court could make a “clearly too lenient” finding and impose an exceptional minimum sentence under an indeterminate sentencing scheme such as RCW 9.94A.712, the precursor to RCW 9.94A.507.⁴ This was because an exceptional sentence that did not exceed the statutory maximum under .712 did not violate the Sixth Amendment. The Court rejected appellate court cases holding to the contrary. Clarke, 156 Wn.2d at 893 (discussing State v. Borboa, 124 Wn. App. 779, 787, 102 P.3d 183 (2004), reversed in part, 157 Wn.2d 108, 135 P.3d 469 (2006)).

As the Clarke Court explained, the federal Supreme Court had rejected a Sixth Amendment challenge in the context of a mandatory minimum sentencing scheme even before Apprendi and Blakely. In McMillan v. Pennsylvania, the Court upheld a sentencing statute that required a mandatory minimum sentence of five years if the court found the accused visibly possessed a firearm during the commission of the crime. 477 U.S. 79, 93, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986). The

⁴ Laws of 2008, ch. 231, § 56 (eff. Aug. 1, 2009) (recodifying RCW 9.94A.712 as RCW 9.94A.507).

McMillan Court rejected the argument that the Sixth Amendment barred such judicial fact-finding; the statute “neither alter[ed] the maximum penalty for the crime committed nor create[d] a separate offense calling for a separate penalty.” Id. at 87-88.

Moreover, after Apprendi but before Blakely, the Supreme Court also considered whether the holding of McMillan survived Apprendi and concluded that it did. In Harris v. United States, Harris was convicted under a federal statute that required the sentencing judge to impose a certain minimum term if he or she found the defendant had brandished a gun during the commission of his crime. 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002). The sentencing judge made the finding and imposed the required minimum. A majority of five justices framed the “principal question” as “whether McMillan stands after Apprendi.” Harris, 536 U.S. at 550. The justices set forth their reasoning, however, in groups of four, four, and one. The first group of four (Kennedy, O’Connor, Rehnquist, and Scalia) reasoned that a fact increasing the mandatory minimum, but not extending the term beyond the statutory maximum, need not be found by a jury because the verdict authorized the judge to impose the minimum with or without the finding. 536 U.S. at 557. Thus, the four concluded the finding in McMillan, contrary to the

finding in Apprendi, restrained the judge's power by limiting his or her choices within the authorized range. Harris, 536 U.S. at 566-67.

Dissenting, the second group of four justices (Ginsburg, Stevens, Souter, and Thomas) would have overruled McMillan because it conflicted with Apprendi. Harris, 536 U.S. at 573, 572.

But the remaining jurist, Justice Breyer, could not “easily distinguish Apprendi” or “agree with” the first plurality's attempt to do that. Nonetheless, he could “not yet accept [Apprendi’s] rule,” so he concurred with the first group of four. Harris, 536 U.S. at 569-70.

In Alleyne v. United States, a four-justice plurality, joined by a Breyer concurrence,⁵ explicitly overruled McMillan and Harris and held that any fact that increases a mandatory minimum sentence “increases the penalty for a crime” and thus must be submitted to a jury. Alleyne, ___ U.S. ___, 133 S. Ct. 2151, 2155, 186 L.Ed.2d 314 (2013).

The jury convicted Alleyne of robbery affecting interstate commerce and using or carrying a firearm in relation to a crime of violence. Using or carrying a firearm subjects an offender to a term not less than five years, brandishing the firearm subjects an offender to a term not less than seven years, and discharging the firearm subjects an offender

⁵ Breyer stated he continued to disagree with Apprendi but reiterated he could not distinguish Harris from Apprendi. 133 S. Ct. at 2166.

to a term not less than 10 years. The jury's verdict found Alleyne had used or carried a firearm during the commission of the crime. Alleyne, 133 S. Ct. at 2156.

The government recommended a seven-year sentence, which reflected the mandatory minimum sentence for an offender who had brandished a firearm during offense commission. Alleyne objected, contending a seven-year term would violate his Sixth Amendment right to a jury trial because the jury did not find brandishing beyond a reasonable doubt. The district court relied on Harris to overrule Alleyne's objections, explaining that brandishing was a sentencing factor it could properly find by a preponderance of the evidence. It thus imposed the seven-year term. Alleyne, 133 S. Ct. at 2156.

The Fourth Circuit affirmed. Id. In reversing, however, the Supreme Court stated Apprendi's definition of "elements" includes "not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment[.]" Alleyne, 133 S. Ct. at 2158. The court rejected the Harris holding that a judicial finding increasing the mandatory minimum did not implicate Blakely because it "merely limited the judge's 'choices within

the authorized range.’’ Alleyne, 133 S. Ct. at 2157-58 (quoting Harris, 536 U.S. at 567).

The opinion expressly overruled Harris, and, by extension, McMillan. The Supreme Court has thus soundly rejected the basis for the state Supreme Court decision in Clarke, which the trial court relied on to impose an exceptional minimum term in this case. 19RP 52-53. Following Alleyne, any fact that increases the legally prescribed punishment must be submitted to the jury, whether the fact increases the “floor” or the “ceiling.” 133 S. Ct. at 2158. Moreover, a finding that alters a sentence even within an “authorized range” may still trigger the Sixth Amendment right to a jury.

The underlying crime in Carter’s case was first degree rape. A jury convicted Carter of that crime. But Carter was sentenced for rape “plus.” The “plus” is unscored, yet pertinent, criminal history. The court’s factual finding increased the range within which the court was permitted to sentence Carter. After Alleyne, this requires a jury finding as to the fact causing the increase.

Moreover, without the Clarke exception, Washington courts hold the “clearly too lenient” portion of the finding must be made by the jury because it is a fact in addition to the mere existence of the criminal history. See Alvarado, 164 Wn.2d at 568-69; Saltz, 137 Wn. App. 576,

583-84; cf. State v. Rudolph, 141 Wn. App. 59, 65, 168 P.3d 430 (2007) ("A life sentence under the [Persistent Offender Accountability Act] depends only on the fact of prior convictions; therefore, Blakely does not apply.").

In response, the State may argue that because the trial court can impose a maximum term under RCW 9.94A.507, it necessarily can impose a shorter minimum term, regardless of whether that minimum is standard or exceptional. But Alleyne rejected that proposition in overruling Harris. 133 S. Ct. at 2157-58; see 133 S. Ct. at 2161 (“[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant’s ‘expected punishment has increased as a result of the narrowed range’”) (quoting Apprendi, 530 U.S. at 522, Thomas, J., concurring).

This makes sense under the statutory scheme employed in this case. Regardless of the identification of a “maximum,” the minimum term is the significant measure for Sixth Amendment purposes. A defendant must serve the minimum term that is imposed under RCW 9.94A.507. In contrast, the maximum term serves as a limit on the combined total of the court-imposed and the ISRB-imposed terms. The maximum term under RCW 9.94A.507 reiterates that, in general, neither the court nor the ISRB may maintain jurisdiction over the defendant for more than life for a Class

A felony. RCW 9A.20.010; RCW 9A.20.020; Borboa, 124 Wn. App. at 784.

In summary, the Sixth Amendment requires a jury to find each fact needed to support the sentence the accused actually must serve. The relevant sentence for purposes of this Court's analysis is the longest one supported by the jury's findings of fact. It matters not whether the label applied to such sentence is "minimum" or "maximum." Blakely, 542 U.S. at 303-04.

2. THE REMEDY IS REMAND FOR SENTENCING WITHIN THE STANDARD RANGE.

By its plain language, the statute governing empanelment of a jury on remand does not apply to the aggravating circumstance the trial court found. Moreover, Carter did not receive the required notice under the SRA nor any notice whatsoever until after the jury reached its verdicts. This violated Carter's statutory and due process rights. This Court should therefore remand to impose a standard range sentence.

Under RCW 9.94A.537(2), "In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the

previous sentence, at the new sentencing hearing.” The plain language of this provision does not apply to sentences under RCW 9.94A.535(2). State v. McNeal, 156 Wn. App. 340, 353-54, 231 P.3d 1266, review denied, 169 Wn.2d 1030 (2010). Trial courts do not have inherent authority to empanel sentencing juries. State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). The State is therefore prohibited from empanelling a jury to consider the .535(2)(b) factor on remand. McNeal, 156 Wn. App. at 353.

Under RCW 9.94A.537(1), moreover, “[a]t any time *prior to trial or entry of the guilty plea* if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.” (Emphasis added.) Thus, the notice provisions of RCW 9.94A.537 apply where aggravating circumstances must be found by a jury. State v. Mutch, 171 Wn.2d 646, 659, 254 P.3d 803 (2011); State v. Bobenhouse, 143 Wn. App. 315, 331, 177 P.3d 209 (2008), aff’d, 166 Wn.2d 881, 214 P.3d 907 (2009); see also State v. Edvalds, 157 Wn. App. 517, 531, 237 P.3d 368 (2010) (notice not required for sentences based solely on prior convictions but “clearly required as to factors that go to the jury”), review denied, 171 Wn.2d 1021 (2011). Carter may not be subjected to an enhanced sentence

on remand because he did not receive timely notice he was subject to such an aggravator in the first instance.

The result is the same under the state and federal constitutions. Under article 1, section 22 of the Washington Constitution, “the accused shall have the right . . . to demand the nature and cause of the accusation against him.” This requires that “[a] criminal defendant is to be provided with notice of all charged crimes.” State v. Schaffer, 120 Wn.2d 616, 619, 845 P.2d 281 (1993). The Sixth Amendment requires that “[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation.” The protection afforded by each of these constitutional provisions is the same. State v. Hopper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992).

In State v. Powell, the defendant’s exceptional sentence had been reversed based on Blakely. Powell, 167 Wn.2d 672, 676, 223 P.3d 493 (2009), overruled by State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012). Powell argued the superior court was not authorized on remand to impanel a jury to consider aggravating factors because he was not given notice before trial of the State’s intent to seek an exceptional sentence. Powell, 167 Wn.2d at 677.

The plurality and the concurrence agreed that, in the narrow circumstance of resentencing after Blakely, the State need not have

alleged the aggravating factors in the information. Id. at 687 (plurality); id. at 690 (Stephens, J., concurring); see also State v. McNeal, 156 Wn. App. 340, 356-57, 231 P.3d 1266 (2010) (notice is not required under Powell for an aggravated sentence based on RCW 9.94A.535(2)(c) “free crimes” for post-Blakely resentencing because judicial fact-finding of factor was permitted).

But in Powell five justices agreed that going forward, aggravating factors that require proof of additional facts that must be found by a jury, should be charged in the information. Powell, 167 Wn.2d at 690 (Stephens, J., concurring); id. at 694 (Owens, J., dissenting).

Three years after Powell, the Washington Supreme Court decided Siers, which held an aggravating factor need not be charged in the information. Because, the Court found, the charging document contained the “essential elements” of the crimes charged, and because Siers was given notice before trial of the State's intent to seek an aggravated sentence, his due process rights were not violated. Siers, 174 Wn.2d at 271. The Court overruled Powell and held that as long as a defendant receives adequate notice of the essential elements of a charge, the absence of an aggravating factor in the information does not violate the defendant's constitutional due process rights. Siers, 174 Wn.2d at 276-77; cf. id. at 174 Wn.2d at 284 (“when a defendant's ultimate sentence is in accordance

with the allegations in the charging document, there is no Sixth Amendment violation”)(Stephens, J., concurring).

Carter’s sentence does not survive the rule announced in Siers. Carter received notice of the intent to seek an exceptional sentence only *after* trial. Supp. CP __ (sub no. 164, supra). Based on the SRA and the due process right to notice, because Carter did not receive notice of the intent to prove such a crime until after trial, he may not now be subjected to the aggravator. For the reasons stated above, moreover, the court would not have the authority to empanel such a jury on remand.

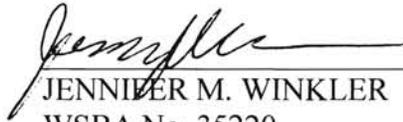
D. CONCLUSION

This Court should remand for the court to impose a sentence within the standard range.

DATED this 12TH day of November, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70441-9-I
)	
JOHN CARTER,)	
)	
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 12TH DAY OF NOVEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHN CARTER
DOC NO. 632238
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF NOVEMBER 2013.

X *Patrick Mayovsky*

NOV 12 11:14:38
CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA