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A. ARGUMENT IN REPLY

Respondent has filed a brief which is overwhelming in its citing string of cases irrelevant to the issue and its lack of focus in the Argument section of the brief. In every instance, cited authority is not even collaterally related to the analysis of the issue on appeal. In other instances, respondent simply has a unique view of the record.

Appellant's goal in his reply brief is to try to refocus the issue and to counter the impression that the one year statute of limitation is ambiguous and that the issue is particularly complex and the law unclear.

1. Substantive Facts.

Mr. Johnson filed a Public Records Act (PRA) request. Mr. Johnson was given 1 e-mail. A private citizen requested the same documents and was given 292 documents:

<u>Mr. Johnson's Requested</u>	<u>Private Citizen Requested</u>
(1) All documentation identifying why the draft was initiated (legislation, Department of Corrections attorney general office, opinions, memos, etc.)	(1) All documents identifying why the draft was initiated (legislation, DOC, AGs, opinions, memos, etc.;
(2) Research Documents;	(2) Research Documents;
(3) all drafts;	(3) All drafts;
(4) Statewide Comments;	(4) Statewide comments
(5) A Completed Policy Directive Development Checklist	(5) A completed Policy Directive Checklist;
(6) names of the authors;	(6) Names of authors;
(7) The committee members who drafted and prepared the revised DOC 590.100 V.A.9.	(7) The committee members who drafted and prepared the DOC 590.100 V,A,9.

See Mr. Johnson's first request August 16, 2010, CP 22.
See **Appendix A.**

Now see the Department response to private citizen,
Mrs. Melinda Carter request for the same documents. CP 122.

See **Appendix B.**

The Department's response to Mr. Johnson's first public
disclosure request states in part:

"The most current version was revised, 10/1/05 and we are
not required to maintain working files. However, the only
information we have is an email documenting approval of the
change."

CP 24. See **Appendix C.**

The Department responded to Mr. Johnson's second public
disclosure request a year later stating in part:

"I note that in August 2006, you were provided a 1 page memo
responsive to a similar request. There are no additional
records responsive to your request. As such your request is
considered close."

CP 41. See **Appendix D.**

Mr. Johnson requested all drafts, the Department
withheld the drafts Mr. Johnson requested, but provided Mrs.
Carter with the same drafts he requested. CP 43 & 44. See
Appendix E.

In Mr. Johnson's second public disclosure request he
requested all e-mails. The Department withheld e-mails
pertaining to his request. CP 28 & 29 See **Appendix F.**

Mrs. Carter did not request e-mails, nevertheless, the
Department provided her e-mails dating as far back as
November 2005. These e-mails are part of the 292 documents
provided to Mrs. Carter, but were withheld when Mr. Johnson

requested them. CP 46 & 48. See Appendix G.

2. Argument of Facts and Governing Law.

It appears respondent is privy to documents relating to the removal of DOC 590.100 V.A. § 9, at page 2, footnote 1. Nonetheless, Respondent argues no documents were withheld. CP 43-44 See Appendixes E and G. Moreover, Respondent would have this Court believe 291 documents were gathered after Mr. Johnson August 16, 2006, request, where he was provided one e-mail. CP 24, Appendix C.^{1/}

In face of all the incontestable documented evidence presented in Mr. Johnson's Motion To Show Cause, CP 2-47; Plaintiff's Reply To Defendant Response To Show Cause Motion, CP 78-85; Motion for Reconsideration Pursuant to LCR 59, CP 86-122; Notice of Appeal; and Appellant's Opening * Brief, Respondent still alleges no documents were withheld even after Mr. Johnson presented drafts and e-mails of the 292 documents the Department provided Mrs. Carter, which were withheld from him August 24, 2006.

Most basically, a lawyer, especially a State Attorney General, is forbidden to "[k]nowingly make a false statement of law or fact" to the court: Model Code of Professional

1. Pursuant to DOC Policy 130.200 prohibits DOC and Attorney General' office from destroying any documents relating to DOC 590.100 from June 2005 to December 2009, because DOC 590.100 was still being challenged in the federal court by Mr. Johnson. DOC has not destroyed any of the records pursuant to RCW 40.14.070 that Mr. Johnson requested. The October 2005 revised policy DOC mentioned in Appendix C still exist, and Respondent knows this. Contrary to Respondent's allegations that "there were three more years worth of responsive records located." DOC 590.100, V.A. 9 was deleted October 2005, and became effective June 8, 2006. This section of DOC policy 590.100 has never been addressed since. See CP 22, CP 24, and CP 41.

Responsibility, DR 7-102(A). The same prohibition, in virtually the same words, appears in Rule 3.3(a)(1) of the Model Rules of Professional Conduct.

The plain language of RCW 42.56.550(6) is clear that the one-year statute of limitation is triggered by one of two occurrences: the agency's claim of an exemption or the agency's last production of a record on a partial or installment basis. Respondent confessed to this Court at page 6 neither of these requirements occurred in response to neither of Mr. Johnson's request for public records. Therefore, the 1-year statute of limitation does not apply to bar Mr. Johnson's claims. Rental Housing Ass'n v. City of Des Moines, 165 Wn.2d 525, 539-41 (2009).

Respondent conceded at the trial court and now concedes again pursuant RCW 42.56.550(6) that no exemption was provided to Mr. Johnson, and concedes that no production of a record on a partial or installment basis was provided to Mr. Johnson.

Respondent has misinterpreted the holding of Washington Supreme Court in Rental. Respondent would have this Court believe that Rental analysis and Rental interpretation of RCW 42.56.550(6) is not binding on Tobin v. Worden, 156 Wn.App. 507 (2010). In other words, the Tobin Court decision is not binding on Division II. This may be true in one sense, but Divisions I, II, and III are bound by the decisions of the Supreme Court in Rental Housing Ass'n v. City of Des Moines, 165 Wn.2d 525 (2009). In Tobin

the court found as the Rental court that:

"[t]he statutory language is clear that the one-year statute of limitation is only triggered by two specific agency responses—a claim of exemption and the last partial production— not simply the agency's "last" response. Had the legislature determined that the agency's last response would suffice, it would have expressly so stated." 156 Wn.App. at 515.

Respondent's brief at page 6 has misunderstood the Rental Court. The Supreme Court expressly states: "This case presents the question of when a response to a record request is sufficient to trigger the running of the limitation period." Not as Respondent interpreted: "Rental Housing dealt with the sufficiency of the content of an exemption log for the purpose of determining when the statute of limitations begins to run in a public record case. Id at 541." Respondent has cited this court to read a passage in Rental that has nothing to do with Respondent's statement, and Respondent's statement cannot be found anywhere in Rental.

Both Rental and Tobin are on point with the facts and the law governing Mr. Johnson's case. Respondent has cited to no case law to support its position, and Respondent has produced no document that contradicts Mr. Johnson's incontestable documented evidence.

The only documents Respondent introduced and points the court to are 21 pages of Mr. Johnson's DOC history where he moved from one cell to another; his jobs while incarcerated; prison infractions, etc. There is nothing remotely relevant to the issues sub judice about Mr. Johnson's prison history

that Respondent asks the Court to peruse and consider. At page 3 of Respondent's brief. See CP 49-77. Respondent's argument must fail.

3. Judicial Notice.

This Court should take judicial notice that Respondent made concession at the trial court level that drafts and e-mails were withheld by not objecting, not arguing no documents were withheld. This is a new issue.

It is too late in the game for Respondent to change horses in the middle of stream. Respondent's position has always been that the 1-year statute of limitation begin to run August 24, 2006, when Department provided Mr. Johnson a one page document.

The trial court's Order is predicated on Respondent's argument, and theory. See The "NARRATIVE REPORT OF PROCEEDINGS" at pages 1 and 2. It has already been established at the court below that documents were withheld.

During the proceeding below, Respondents did not attempt to fabricate a baseness theory or frivolous argues that no documents were withheld relating to the removal of DOC Policy 590.100, V.A. 9 August 24 2006,^{2/} but rather that the statute of limitation pursuant RCW 42.56.550(6) begin to run when the Department provided Mr. Johnson with a single document. Rental Housing, 165 Wn.2d at 539-40;

but see Tobin, 156 Wn.App. at 515 addresses this very issue leaving no doubt that:

"the one-year statute of limitation is only triggered by two specific agency responses-a claim of exemption and the last partial production-not simply the agency's "last" response."

Respondent's issue and argument are new-it is an attempt to muddy the water to cloud the real issue-it must be rejected.

B. CONCLUSION

Because Respondent has cited to no case law, no statute to support its position, naked allegations, and has not produced one document to dispute Mr. Johnson's documents showing where DOC withheld documents, this Court should reverse the trial court's order, and remand for further proceedings with a different trial judge. This Court should further award attorney fees, and expenses pursuant to RCW 42.56.550(4).

Respectfully submitted this 7th day of November 2010.


Robert E. Johnson, #126696
Monroe Corr. Complex/TRU
PO Box 888
Monroe, WA 98272

-7-

2. If the Court of Appeals have any problems with the documents DOC provided to Mrs. Carter, who in turn supplied Mr. Johnson with two drafts, and two e-mails of the 292 pages, which the Department withheld during Mr. Johnson's August 16, 2006, Public Record Act request. Mr. Johnson respectfully requests the Court to holding an evidentiary hearing, in the alternative Mr. Johnson would urge the Court to do an in camera inspection of public disclose unit tracking number PDU 6839. See CP 122, Appendix B.

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Robert E. Johnson, #126696
McNeil Island Corrections Center
P.O. Box 881000
Steilacoom, WA 98388

August 16, 2006

Gaylene Schave, Public Disclosure Coordinator
Public Disclosure Unit
Department of Corrections Operations
P.O. 41118
Olympia, WA 98504-1118

Dear Ms. Schave:

I am writing regarding DOC Policy 590.100. On March 3, 2006, DOC Secretary Harold W. Clarke signed approval to remove section V.A.9 "requiring positive prognosis of release" from DOC 590.100. This policy went into effective June 8, 2006.

I am respectfully requesting information pertaining to the removal of DOC 590.100 V.A.9 pursuant to DOC Policy 100.100: (1) All documentation identifying why the draft was initiated (legislation, Department of Corrections, attorney general office, opinions, memos, etc.) (2) Research documents; (3) all drafts; (4) Statewide comments; (5) A Completed Policy Directive Development Checklist; (6) names of the authors; (7) the committee members who drafted and prepared the revised DOC 590.100 V.A.9. Please send me a detailed description of each document.

Ms. Schave, I have a ongoing lawsuit in the United States District Court, Cause No. C05-5401FDB/JKA, based on DOC 590.100 V.A.9. I have \$251.95 in my inmate saving account, which is available if the McNeil Island Corrections Center Superintendent is willing to cut a check for legal costs/legal financial obligation. This is the only monies I have to pay for the requested documents. However, I would ask that any cost be charged to me at the end of this litigation, that is, if MICC refuses to cut a check from my saving account.

Sincerely,


Robert E. Johnson

Files

Appendix A



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
P.O. Box 41100 • Olympia, Washington 98504-1100

June 3, 2009

Ms Melinda Carter
13445 Martin Luther King Jr. Way, S. #L411
Seattle, WA 98178

Dear Ms. Carter:

This letter is in follow up to my letter to you dated April 27, 2009 regarding your public disclosure request with tracking number PDU-6839. You have requested all documents pertaining to the removal of section V, A, 9 "requiring positive prognosis of release" from DOC 590.100 to include the following:

1. All documents identifying why the draft was initiated (legislation, DOC, AGs, opinions, memos, etc.;
2. Research documents;
3. All drafts;
4. Statewide comments
5. A completed Policy Directive Checklist;
6. Names of authors;
7. The committee members who drafted and prepared the revised DOC 590.100 V, A, 9.

I have gathered 292 pages responsive to include the above criteria. To obtain these records please send a check and money order in the exact amount of \$63.35 (\$0.20 x 292 pages copy costs = \$58.40, and a mailing cost of \$4.95). Make payable to the Department of Corrections and mail to the Public Disclosure Unit at PO Box 41118, Olympia, WA, 98504. When payment is received the records will be mailed to you.

Sincerely,

Gaylene Schave, Public Disclosure Specialist
Public Disclosure Unit
Department of Corrections

GS:PDU-6839

Appendix B

"Working Together for SAFE Communities"



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
P.O. Box 41100 • Olympia, Washington 98504-1100

August 24, 2006

Mr. Robert E. Johnson, DOC 126696
McNeil Island Corrections Center
PO Box 881000
Steilacoom, WA 98388

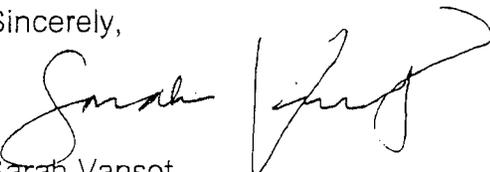
Dear Mr. Johnson:

I am in receipt of your letter dated August 16, 2005, and received in my office on August 21, 2006. You are requesting all documentation identifying why the draft was initiated, research documents, all drafts, statewide comments, names of the authors, and the committee members who drafted and prepared the revised DOC 590.100 Extended Family Visiting (EFV), effective 6/8/06.

You apparently have an outdated DOC 100.100 Policy Development. The most current version was revised, 10/1/05 and we are not required to maintain working files. However, the only information we have is an email documenting approval of the change.

To receive a copy from the Policy Office, you will need to pay \$0.20 per page, plus the cost of mailing the document to you. This is a one page email with a document fee of \$0.20, plus \$0.39 for postage. Upon receipt of payment in the amount of \$0.59, payable to the Department of Corrections in a form of a check or money order, I will forward the requested material to you.

Sincerely,


Sarah Vansot
Administrative Assistant

SV:ASD-079
cc: Dawn Deck, PDC
File

Appendix C

"Working Together for SAFE Communities"



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
P.O. Box 41100 • Olympia, Washington 98504-1100

August 27, 2007

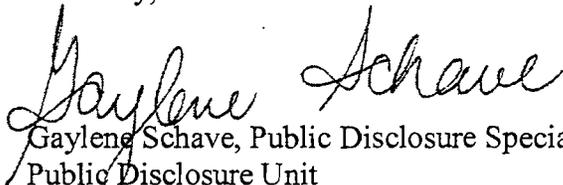
Mr. Robert Johnson, DOC 126696
McNeil Island Corrections Center
P.O. Box 88900
Steilacoom, WA 98388

Dear Mr. Johnson:

This letter is in follow up to my previous response to you dated August 23, 2007, regarding public disclosure tracking number, PDU-837. You had requested records regarding the revision of DOC 590.100, Extended Family Visiting.

I note that in August 2006, you were provided a 1 page memo responsive to a similar request. There are no additional records responsive to your request. As such, your request is considered closed.

Sincerely,


Gaylene Schave, Public Disclosure Specialist
Public Disclosure Unit
Department of Corrections

GS:PDU-837

Appendix D

"Working Together for SAFE Communities"



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

DRAFT
POLICY

APPLICABILITY
PRISON

REVISION DATE
DRAFT
10/05

PAGE NUMBER
1 of 16

NUMBER
DOC 590.100

TITLE

EXTENDED FAMILY VISITING (EFV)

REVIEW/REVISION HISTORY:

Effective: March 15, 2001
Revised:

SUMMARY OF REVISION/REVIEW:

[Empty rectangular box for summary of revision/review]

APPROVED:

HAROLD W. CLARKE, Secretary
Department of Corrections

Date Signed

Appendix E

000007



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

DRAFT POLICY

APPLICABILITY
PRISON

REVISION DATE
DRAFT
10/05

PAGE NUMBER
6 of 16

NUMBER
DOC 590.100

TITLE
EXTENDED FAMILY VISITING (EFV)

- a. All other infractions or related behavior will be handled per the allowable sanctions and policy provisions of WAC 137-28 which provides an allowable sanction as "Interruption of visitation between the offender and a specified individual(s) for a period up to 180 consecutive days, when there has been an infraction for visit related behavior or behavior that presents a security or safety threat. In cases of multiple or very serious offenses, recommendations may be made to the Superintendent for an extended or permanent loss of the privilege." A classification committee review must occur after an offender receives any serious infraction to determine continued eligibility.
5. The offender must be actively and successfully participating in Case Management, school or work assignment, or establish that a reasonable effort has been made to obtain a school or work assignment.
6. The offender is not housed in pre-hearing confinement, disciplinary/ administrative segregation, or Intensive Management Status (IMS).
7. The offender has not been charged with a felony which has been referred for prosecution to an outside law enforcement agency.
8. The offender does not have a documented detainer for a crime of violence or other serious crime, which would pose a question of security risk.
9. The offender must have a positive prognosis of release. Offenders whose time/sentence structure indicates a limited if not unlikely possibility of release to the community may be denied approval for the program.
10. Offenders with documented history of domestic violence, as defined below, against any person will be excluded from participation.
 - a. Documentation includes a conviction, arrest, or other evidence of domestic violence in the offender's central or medical file.
 - b. Such exclusion will apply to the category of persons to whom the violence was directed (i.e., wife/intimate partner precludes visits with spouses).
 - c. Such exclusion may apply, but not necessarily, to other categories of family members to whom the violence was not directed (i.e., parents, children).

000032

September 10, 2006

TO: Judy M. Hubert, AA4, Legal Liaison
FROM: Robert E. Johnson, DOC #126696
SUBJECT: REMOVAL OF DOC POLICY 590.100, Sec. V.A. 9

Dear Ms. Hubert:

On September 8, 2006, I received a letter back from the Legislative Information Specialist in Olympia, Washington. That letter informed me that the information I sought was not part of their database. That letter also informed me that each correctional facility has its own disclosure policy and that I must request this information from the Department of Corrections.

Therefore this request is made under the Freedom of Information Act (FOIA), 5 U.S.C. Section 552, and the Privacy Act 5 U.S.C. § 552a. It is further made pursuant to the state open records law, RCW 42.17.010 to 42.17.350.

Please send me copies of any information regarding the removal of DOC Policy 590.100, Sec. V.A. 9-the Extended Family Visiting (EFV). The Distribution Reference File #PO6-25, Date April 3, 2006; Date Signed March 30, 2006 by DOC Secretary Harold Clarke; Revision June 8, 2006. I am respectfully requesting the following documents between August 2005 to September 2006.

*The names of the authors, committee members who drafted and prepared the revised/removal of DOC 590.100, Sec. V.A.9, Extended Family Visiting revised June 8, 2006;

*Documentation identifying why the draft was initiated (legislation, attorney general opinions, memos, etc.);

*Research documents;

*All drafts;

*Statewide comments;

*All E-mails, comments, correspondence, memos sent to the authors and committee members from Department of Corrections Secretary's Office;

Appendix F

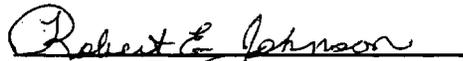
*All E-mails, comments, communications, and memorandums sent between the legislative office, the authors, committee members from the Attorney General's Office, and Assistant Attorney General Allison M. Stanhope regarding the removal of Section V.A. 9 of DOC Policy 590.100.

As you know, the Freedom of Information Act provides that if portions of a document are exempt from release, the remainder must be segregated and disclosed. Therefore, I will expect you to send me all nonexempt portions of the records which I have requested, and ask that you justify any deletions with reference to specific exemptions of FOIA. The information requested is not to be used for commercial benefit, so I do not expect to be charged fees for your review of the material to see if it falls within one of FOIA's exemptions.

FOIA provides for waiver of fees. This request should be exempt from all fees because this information will be distributed to the Attorney General's Office and United States District Court of Western Washington so they will be better informed about the operation of Department of Corrections and is likely to contribute significantly to public understanding of the DOC activities. If you deny this request, however, please notify me if fees will exceed \$25.00 so I can decide whether to pay the fees or appeal your denial of my request for a waiver to the United States District Court.

Ms. Hubert, I am putting you on NOTICE that any delays in retrieving the requested information could result in legal consequents. I thank you in advance for your time, consideration, cooperation, and any promptness you may take in sending me this information.

Respectfully submitted,


Robert E. Johnson
DOC #126696, B-234

cc: files

Appendix F

Somdalen, David R. (DOC)

n: Gorman, Patricia A. (DOC)
Sent: Monday, April 27, 2009 14:09
To: Somdalen, David R. (DOC)
Subject: FW: EFV Policy

Attachments: Pat's draft of 590.100 with changes.doc; Pat's draft of 590.100 with changes incorporated.doc

From: Somdalen, David R.
Sent: Tuesday, February 07, 2006 10:43 AM
To: Gorman, Patricia A.
Subject: FW: EFV Policy

Hi Pat,

I now have included your draft with changes showing and your draft with the changes incorporated.

Dave

-----Original Message-----

From: Somdalen, David R.
Sent: Monday, February 06, 2006 4:32 PM
To: Gorman, Patricia A.
Subject: RE: EFV Policy

I have attached one with changes showing and one without.



Pat's draft of 590.100 with ch... Pat's draft of 590.100 with ch...

Dave

-----Original Message-----

From: Gorman, Patricia A.
Sent: Monday, February 06, 2006 3:42 PM
To: Somdalen, David R.
Subject: FW: EFV Policy

Please make a copy of this in word without the changes showing. Mark it a draft and send back to me on an e mail with one copy having the changes showing and one copy without them showing. Thanks.

-----Original Message-----

From: Gorman, Patricia A.
Sent: Friday, November 04, 2005 1:45 PM
To: Banner, Kathryn A.; Brunson, Karen D.; Cherry, Phyllis J.; Clark, Lynn I.; Cool, Jon E.; Goff, Darin S.; Gorman, Patricia A.; Jasper, Karen A.; Parnell, Jane L.; Pettitt, Andy L.; Powell, M Lynn; Stewart, Belinda D.; Svoboda, Arminda P; Waller, Kevin O.
Subject: EFV Policy

I made a couple of changes. If you have any comments or questions let me know. << File: Pat's draft of 590.100.doc >>

000102

Owens, Marjorie

File 790.100

From: Vail, Eldon W. (DOC)
Sent: Thursday, March 30, 2006 8:46 AM
To: Owens, Marjorie
Cc: Ober, Terri K.
Subject: RE: Extended Family Visits

Go with the version we worked on before and send it to Harold for signature.

-----Original Message-----

From: Owens, Marjorie
Sent: Thursday, March 30, 2006 8:42 AM
To: Vail, Eldon W. (DOC)
Cc: Ober, Terri K.
Subject: RE: Extended Family Visits

Depends. Do you want to finalize the version I gave you with the changes you asked me to make? Do I need to send it to Dep Secs for review or can it go straight to the Secretary for signature?

If I've got all the changes already and it can go straight to the Secretary we can send it to him by tomorrow. If I've got all the changes and it's needs Dep Sec review, I can send it to Dep Secs this afternoon. Only you have a habit of responding to Dep Sec review within the time frames, so I can't tell you how long it will take.

If there are additional changes I'm not aware of I'll need to make then and have you double check. That will add a day or two depending on your availability.

-----Original Message-----

From: Vail, Eldon W. (DOC)
Sent: Thursday, March 30, 2006 8:13 AM
To: Owens, Marjorie; Ober, Terri K.
Subject: FW: Extended Family Visits

FYI for different reasons. Marjorie, how long until you can get the new policy out?

-----Original Message-----

From: Clarke, Harold W. (DOC)
Sent: Wednesday, March 29, 2006 5:24 PM
To: Vail, Eldon W. (DOC)
Subject: RE: Extended Family Visits

I have received verbal okays from Hargrove and O'Brien, however, I have not received any written response. I would say that we can take them at their spoken word and proceed to make the change.
HWC

-----Original Message-----

From: Vail, Eldon W. (DOC)
Sent: Wednesday, March 29, 2006 10:09 AM
To: Clarke, Harold W. (DOC)
Subject: Extended Family Visits

Are we ok to make the change proposed to allow lifers to participate in the extended family visit program if they otherwise qualify?

AFFIDAVIT OF SERVICE BY MAIL

I, ROBERT E. JOHNSON, CERTIFY UNDER THE PENALTY OF PERJURY AND UNDER THE LAWS OF THE STATE OF WASHINGTON AND FEDERAL LAWS THAT THE FOLLOWING IS TRUE AND CORRECT:

That on the 7th day of November 2010, I served the following by depositing the original and a copy to the Court of Appeals, and a copy to the Attorney General in the United States mail.

1. REPLY BRIEF OF APPELLANT

2. AFFIDAVIT OF SERVICE BY MAIL

addressed to:

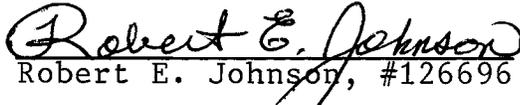
[x] Sara J. Di Vittorio
Assistant Attorney General
PO Box 40116
Olympia, WA 98504-0116

[x] Court of Appeals, Division II, Clerk
950 Broadway, Suite 300
Tacoma, WA 98402

10 NOV -9 PM 8:15
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY _____
DEPUTY

I declared under the penalty of perjury under the laws of the State of Washington, pursuant to RCW 9A.72.085, and the laws of the United States pursuant 28 U.S.C. §1746, that the forgoing is true and correct.

EXECUTED this 7th day of November 2010, Monroe, WA.


Robert E. Johnson, #126696