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NO. 41476-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MARIO MARTINEZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey, Judge

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OPENING BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issues Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural Facts</u> .....	2
2. <u>Substantive Facts</u> .....	3
3. <u>Facts Related to Assignments of Error 1 and 2</u> .....	6
C. <u>ARGUMENT</u> .....	7
1. THE COURT’S FAILURE TO READ ALOUD TO THE JURY THE INSTRUCTION DEFINING ASSAULT WAS ERROR AND REQUIRES MARTINEZ’S CONVICTION BE REVERSED.....	7
2. THE FLAWED INSTRUCTION FOR THE DEADLY WEAPON SPECIAL VERDICT REQUIRES THAT THE DEADLY WEAPON ENHANCEMENT BE VACATED.....	12
D. <u>CONCLUSION</u> .....	17

**TABLE OF AUTHORITIES**

	Page
<b><u>WASHINGTON CASES</u></b>	
<u>Seattle v. Harclaon</u> 56 Wn.2d 596, 354 P.2d 928 (1960) .....	8
<u>State v. Bashaw</u> 144 Wn. App. 196, 182 P.3d 451 (2008) <u>reversed</u> , 169 Wn.2d 133, 234 P.3d 195 (2010) .....	12, 13, 14, 15, 16
<u>State v. Brown</u> 147 Wn.2d 330, 58 P.3d 889 (2002) .....	14
<u>State v. Byrd</u> 125 Wn.2d 707, 887 P.2d 396 (1995) .....	8
<u>State v. Clausing</u> 147 Wn.2d 620, 56 P.3d 550 (2002) .....	14
<u>State v. Eastmond</u> 129 Wn.2d 497, 919 P.2d 577 (1996) .....	8
<u>State v. Fagalde</u> 85 Wn.2d 730, 539 P.2d 86 (1975) .....	8
<u>State v. Goldberg</u> 149 Wn.2d 888, 72 P.3d 1083 (2003) .....	13
<u>State v. Keller</u> 143 Wn.2d 267, 19 P.3d 1030 (2001) .....	9
<u>State v. McIntyre</u> 92 Wn.2d 620, 600 P.2d 1009 (1979) .....	9
<u>State v. Norris</u> 10 Kan.App.2d 397, 699 P.2d 585 (1985) .....	10
<u>State v. Nunez</u> ___ Wn. App. ___, 248 P.3d 103 (2011) .....	14

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

	Page
<u>State v. Ryan</u>	
___ P.3d ___, 2011 WL 1239796 (April 4, 2011).....	13, 16
<u>State v. Sanchez</u>	
122 Wn. App. 579, 94 P.3d 384 (2004).....	7, 8, 9, 10, 11, 12
<u>US West Communications, Inc. v. Wash. Util. &amp; Transp. Comm'n</u>	
134 Wn.2d 74, 949 P.2d 1337 (1997) .....	10
 <u>OTHER JURISDICTIONS</u>	
<u>State v. Lindsey</u>	
245 N.J.Super. 466, 586 A.2d 269 (1991).....	10
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 6.15.....	7, 9, 10
RAP 2.5.....	8, 13
Washington Pattern Jury Instruction (WPIC).....	1, 6

A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion for a new trial.
2. The court erred when it failed to read to the jury the instruction defining assault.
3. The court erred in instructing the jury that it must be unanimous to answer the special verdict form.

Issues Pertaining to Assignments of Error

1. The court failed to instruct the jury on the definition of assault and neither the State nor the defense requested the instruction. After the jury began its deliberations it asked the court for the legal definition of assault. Over defense objection the Washington Pattern Jury Instruction (WPIC) defining assault was given to the jury in writing. Appellant later moved for a new trial because the court failed to read the instruction aloud to the jury.

a. Did the court err in denying appellant's motion for a new trial?

b. Where the defense was lack of intent was the court's failure to read aloud to the jury the instruction defining assault reversible error?

2. It is reversible error to instruct jurors they must be unanimous in order to find the State has failed to satisfy the requirements of a sentencing enhancement. Appellant's jury received such an

instruction. Must the special verdict and appellant's enhanced sentence be vacated?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Grays Harbor County Prosecutor's Office charged Mario Martinez with two counts of second degree assault based on the use of a deadly weapon. Michael Pena was the named victim in count 1 and Efren Pena was the named victim in count 2. CP 6-7. Both counts alleged Martinez was armed with a deadly weapon. Id.

Jurors received special verdict forms that asked whether Martinez was armed with a deadly weapon at the time of the commission of the crimes. CP 33-34. They were instructed that:

In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer on that count. If you have a reasonable doubt as to this question, you must answer "no" on that count.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision.

CP 32 (instruction 22, emphasis added).

Jurors convicted Martinez on count 1 and answered "yes" on the deadly weapon special verdict form. CP 35-36. Martinez was acquitted on count 2. CP 37.

The court reluctantly sentenced Martinez to 15 months, which included the 12 month deadly weapon enhancement. CP 43-40; 2RP 6-7<sup>1</sup>. Before imposing the sentence, the court questioned whether the deadly weapon allegation was appropriate. The court was tempted to give Martinez an exceptional sentence below the standard range but concluded “knowing how this operation works around here, there would be an appeal and we would waste a lot of time, and we would be back here in a couple of years trying to figure it out.” 2RP 6-7.

2. Substantive Facts

On August 15, 2010, Martinez and some friends, which included Michael Pena and his brother Efraim “Scott” Pena<sup>2</sup>, were at a state park. Martinez got drunk, became loud and was rude to other park patrons. 1RP 47-48,62-63,68,81. Michael and Martinez had been friends for years. 1RP 61. Witnesses could not agree on whether Martinez and Michael got into an argument at the park. 1RP 56,63,81,86.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – October 25<sup>th</sup> and October 26<sup>th</sup>, 2010; 2RP – November 15, 2010.

<sup>2</sup> Although count 2 charged Martinez with assaulting “Efren” Pena it is clear the State was referring to “Efraim” Pena who goes by the name “Scott.” 1RP 83. To avoid confusion Michael Pena will be referred to as Michael and Efraim Pena will be referred to as Scott.

Sandra Ashley and Nicole Ziliat were also with Martinez's group. 1RP 47,54. Because Martinez was drunk and belligerent Ashley and Ziliat decided to take Martinez home. 1RP 48.

Martinez lives in a trailer. 1RP 49. Scott is Martinez's roommate. 1RP 81. Michael lives in another trailer on the same property but he uses the bathroom in Martinez's trailer. 1RP 63-64. The trailers are about 50 to 60 feet apart and there are cars parked between the two trailers. 1RP 74.

After Ashley took Martinez home, Martinez went inside his trailer. 1RP 49. Later, Michael and Scott returned home from the park. 1RP 73. A few people, including Michael and Scott, were outside near Martinez's trailer when Martinez came out of his trailer. According to Michael, Martinez said he was going to kill him. 1RP 65. Scott said Martinez came out of his trailer and told Michael he had "something for him." 1RP 82. Martinez had a butter knife in his hand. 1RP 65,82.

Martinez started to chase Michael around the property. 1RP 51,65,83,92. Michael tripped and Martinez came towards him. 1RP 66. Michael said he was afraid for his life but according to Scott, Martinez never got close enough to Michael to stab him. 1RP 66,83. After he tripped, Michael picked up a stick and "smacked" Martinez in the face. 1RP 66. Michael testified Martinez then went after Scott, who "slammed" Martinez to the ground. 1RP 67. Scott, however, testified Martinez came

up to him and gave him a hug. 1RP 85. Scott pushed Martinez away and in the process the butter knife scratched Scott's back. Id.

Martinez then told Michael he was going "mess his stuff up." 1RP 67. Martinez, who had put the butter knife in his belt loop, picked up a cinder block and started to break out the windows of Michael's cars. 1RP 51,67,77,83,92. In response, Michael picked up a baseball bat and positioned himself between Martinez and one of the cars. 1RP 67-68. Michael hit the cinder block Martinez was holding with the bat forcing the block back into Martinez's forehead. 1RP 68. As Martinez turned, Michael swung the bat and hit Martinez in the head. 1RP 57,68,88. Martinez fell to the ground bleeding. Michael took the knife away from Martinez and placed it near an orange flotation device. He then threw the bat in the bushes. 1RP 68.

The police were called and when they arrived they found Martinez sitting on his porch bleeding profusely. 1RP 35,110. Martinez was clearly intoxicated and a breath test showed he had a blood alcohol level of .173. 1RP 44-46,117-123. Martinez was arrested and taken by ambulance to the hospital where he received stitches for his head wounds. 1RP 113.

At the scene police found a bread (butter) knife that Michael identified as the knife he took from Martinez. 1RP 36,40,65. They also

found a metal baseball bat. 1RP 38. Later, at the police station, Martinez gave a statement, where he admitted picking up a knife on his porch and going after Michael. Ex. 17.

3. Facts Related to Assignments of Error 1 and 2

Neither the State nor the defense proposed an instruction defining assault and the court did not instruct the jury on the definition of assault. CP 22-34. During its deliberations the jury sent an inquiry asking for the legal definition of assault. CP 20. The State asked the court to give the jury the WPIC definition of assault. 1RP 155.

Defense counsel objected and suggested the court respond to the inquiry by telling the jury to reread the instructions already provided. 1RP 157. Counsel noted the State did not propose an instruction defining assault and neither the State nor the defense had taken exceptions to the instructions that were given. 1RP 156. Counsel also noted that both sides had made their closing argument based on the instructions given and counsel asked if the jury were given an instruction on the definition of assault if the court was going to allow further arguments to the jury based on the instruction. Id.

The court noted counsel's objection. 1RP 157. It then gave the jury a written instruction defining assault. 1RP 157; CP 21. The court did

not read the additional instruction to the jury and the parties were not allowed to present further arguments on the additional instruction.

Martinez timely moved for a new trial. Martinez argued that under CrR 6.15(d) and Division Three's decision in State v. Sanchez, 122 Wn. App. 579, 94 P.3d 384 (2004), the court was required to read aloud to the jury the instruction defining assault and its failure to do so required Martinez be given a new trial. CP 39-42; 2RP 1. The State did not object. 2RP 2.

The court denied the motion. It reasoned that because the instruction was given after the jury began deliberations, and was in response to the jury's inquiry, under CrR 6.15(f) supplying the jury with the instruction in writing only was sufficient. 2RP 2-4.

C. ARGUMENTS

1. THE COURT'S FAILURE TO READ ALOUD TO THE JURY THE INSTRUCTION DEFINING ASSAULT WAS ERROR AND REQUIRES MARTINEZ'S CONVICTION BE REVERSED.

The court's failure to read aloud to the jury the instruction defining assault, in addition to providing the jury with the instruction in writing, was contrary to the mandate in CrR 6.15(d) and violated Martinez's constitutional right to a fair trial. The court erroneously denied Martinez's motion for a new trial and Martinez's conviction should be reversed.

Martinez raised the issue of the court's failure to read the definition of assault instruction in a motion for a new trial. Thus, the issue is properly preserved for appellate review. State v. Fagalde, 85 Wn.2d 730, 731, 539 P.2d 86 (1975) (citing Seattle v. Harclan, 56 Wn.2d 596, 354 P.2d 928 (1960)).

Moreover, in State v. Sanchez, Division Three held the trial court's failure to read to the jury the instruction defining assault was a constitutional error implicating due process and the right to a fair trial that could be raised for the first time on appeal. Sanchez, 122 Wn.App. at 590 (citing RAP 2.5(a)(3)). The Sanchez court reasoned because the assault definition was the only instruction that contained the essential element of specific intent required to find an assault its omission relieved the State of proving that element beyond a reasonable doubt. Id. (citing State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996) and State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995)).

Sanchez is both factually and legally similar to this case. Sanchez was charged with assault. Sanchez, 122 Wn.App. at 580. Although the jury was given a written instruction defining assault, when the court read the instructions aloud to the jury it inadvertently failed to read the instruction defining assault. Id. at 585. The court's failure to read aloud the instruction resulted in reversal of Sanchez's conviction.

CrR 6.15(d) provides in part “[t]he court shall read the instructions to the jury.” The Sanchez court held the word “shall” in the rule made it mandatory that the court read all the instructions to the jury and the failure to do so is analogous to giving an erroneous, ambiguous or misleading instruction. Sanchez, 122 Wn.App. at 589-90 (citations omitted). The Sanchez court also cited cases from a number of other jurisdictions where the courts have held jury instructions must be read aloud to the jury and the failure to do so is error. Id. (citations omitted).

Here, the court did not bring the jury back into the courtroom and read the instruction defining assault before providing it to the jury in writing. In denying Martinez’s new trial motion the court distinguished Sanchez on the grounds the instruction here was given to the jury after it began deliberations so under CrR 6.15(f) it was not required to read the instruction. That part of the rule, however, does not support the court’s decision.

Court rules are interpreted in the same manner as statutes. State v. McIntyre, 92 Wn.2d 620, 622, 600 P.2d 1009 (1979). When construing a rule the court reads it in its entirety so that no portion is rendered meaningless or superfluous. State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). “Statutes on the same subject matter must be read together to give each effect and to harmonize each with the other.” US West

Communications, Inc. v. Wash. Util. & Transp. Comm'n, 134 Wn.2d 74, 118, 949 P.2d 1337 (1997).

After the jury begins its deliberations, CrR 6.15(f) gives the court the discretion to respond to a jury inquiry in open court or in writing. CrR 6.15(f)(1) (“The court shall respond to all questions from a deliberating jury in open court or in writing.”). It also requires, however, that any additional instructions on the law be given in writing (“Any additional instruction upon any point of law shall be given in writing.”). While CrR 6.15(f)(1) requires the court give a deliberating jury additional instructions on a point of law in writing, it does not purport to give the court the discretion to forego the requirement in CrR 6.15(d) that the court read the instructions aloud to the jury. When the rule is read in its entirety and its provisions harmonized, it requires the court to read instructions aloud to the jury on a point of law even if the instruction is given after the jury begins deliberations.

Moreover, the Sanchez court reasoned that reading instructions to the jury is mandated because “we will not presume the jury reads written instructions alone or that the jury was sufficiently literate to comprehend the instructions accurately.” Sanchez, 122 Wn.App. at 589 (citing State v. Norris, 10 Kan.App.2d 397, 699 P.2d 585, 588 (1985) and State v. Lindsey, 245 N.J.Super. 466, 586 A.2d 269, 274 (1991)). There is no reason to presume a jury would read an instruction or comprehend a written

instruction merely because it is given after rather than before the jury begins deliberating.

As in Sanchez, the court erred in failing to read aloud to the jury the definition of assault instruction. The error was not harmless.

The Sanchez court held the trial court's failure to read the definition of assault instruction in that case was not harmless because it was the only instruction that contained the essential assault element of specific intent to inflict bodily injury or apprehension of fear and Sanchez's defense was he did not have the specific intent to commit the offense. Sanchez, 122 Wn.App. at 590. The same is true here.

First, like in Sanchez, none of the other instructions here contained the essential assault element of specific intent. The additional instruction was the only instruction that had that element.

Second, like Sanchez's defense, Martinez's defense was lack of specific intent. The court gave a voluntary intoxication instruction that told the jury it could consider Martinez's intoxication when determining whether he had the requisite intent. CP 27 (instruction 11). The jury was given a self-defense instruction, which negates the intent element. CP 30 (instruction 20); see, State v. McCullum, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983). And, the jury was instructed it had to find Martinez assaulted Michael Pena with a deadly weapon. CP 25 (instruction 5). Relevant to that determination

was the circumstances in which the butter knife was used and part of the circumstance was Martinez's intent. CP 24 (instruction 7); see, State v. Thompson, 88 Wn.2d 546, 548-49, 564 P.2d 323 (1977) (intent of the user part of the circumstance in determining whether a knife is a deadly weapon). For three alternative reasons Martinez's defense was he did not have the specific intent to the commit the offense.

As in Sanchez, "[t]he lack of a specific intent instruction read orally to the jury raises the possibility some jurors might have convicted without a finding of specific intent." Sanchez, 122 Wn.App. at 591 (citations omitted). Thus, the court abused its discretion when it failed to grant Martinez's motion for a new trial. Like Sanchez's conviction, Martinez's conviction should be reversed. Id.

2. THE FLAWED INSTRUCTION FOR THE DEADLY WEAPON SPECIAL VERDICT REQUIRES THAT THE DEADLY WEAPON ENHANCEMENT BE VACATED.

Instruction 22 told the jurors they must agree on an answer to the special verdict, which was an incorrect statement of the law. In State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010), an instruction containing the same improper requirement was given to the jury. Bashaw, 169 Wn.2d at 139 ("Since this is a criminal case, all twelve of you must agree on the answer to the special verdict."). The Bashaw Court held a

unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's sentence. Id. at 146-147 (citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)).

The State proposed this erroneous instruction. CP\_\_\_\_\_. Defense counsel did not object but the issue can be raised for the first time on appeal as an error of constitutional magnitude. RAP 2.5(a)(3). The defendant in Bashaw did not object to this instruction, either,<sup>3</sup> but the Supreme Court nonetheless reversed after applying the harmless error test applicable to constitutional violations. Bashaw, 169 Wn.2d at 147-48.

Recently, in State v. Ryan, \_\_\_ P.3d \_\_\_, 2011 WL 1239796 (April 4, 2011), Division One expressly held this error can be raised for the first time on appeal. Ryan was charged with assault and harassment and the State alleged an aggravating factor in support of an exceptional sentence. The jurors were told they had to be unanimous in rejecting this factor. Slip op., at \*1. Citing Bashaw, the Ryan court concluded that this error was grounded in due process and could be raised for the first time on appeal. Slip op., at \*2.

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<sup>3</sup> State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010).

In reaching that conclusion, the Ryan court disagreed with Division Three's opinion in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011), where the court found a Bashaw error could not be raised for the first time on appeal. Nunez, 160 Wn. App. at 164. The Ryan Court reasoned that because the Bashaw Court applied the constitutional harmless error standard and refused to find the error harmless even though "the jury expressed no confusion and returned a unanimous verdict in the affirmative", the "error must be treated as one of constitutional magnitude and is not harmless." 2011 WL 1239796, Slip op., at \*2. This Court too should find that under the decision in Bashaw, this error can be raised for the first time on appeal.

Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). In order to find an instructional error harmless, the reviewing court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

Here, the jury was instructed in the same manner as the jury in Bashaw. It was told that "[s]ince this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision." CP 32;

see, Bashaw, 169 Wn.2d at 139 ("Since this is a criminal case, all twelve of you must agree on the answer to the special verdict."). The difference between the instruction in this case and the one given in Bashaw is in Bashaw the instruction specifically mentioned the special verdict. That difference, however, does not change the analysis. The instruction here did not limit the unanimity requirement to merely the general verdict on guilt but referred to all the verdicts, which included the special verdict.

As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. The deliberative process is different when the jury is properly given the option of not returning a unanimous verdict. "The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction." Id.

In Bashaw, the defendant was convicted of three counts of delivering a controlled substance. The jury entered special verdicts finding all three crimes occurred within 1,000 feet of a school bus route stop, increasing Bashaw's maximum sentence. Id. at 137-139. The verdict on one count was vacated based on the erroneous admission of certain evidence. Id. at 140-144. For the remaining counts, however, although *all* of the trial evidence indicated the sentencing enhancement

had been proved, in light of the “flawed deliberative process,” the court refused to find the error harmless. Id. at 138-139, 143-148.

The Bashaw court explained that given a proper special verdict instruction that did not require unanimity, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147. “For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.” Id. at 147-48; see also Ryan, at \*2 (“We are constrained to conclude that under *Bashaw*, the error . . . is not harmless.”).

The same holds true here. On the special verdict, one or more jurors may have entertained doubts whether the prosecution proved beyond a reasonable doubt Martinez was armed with a deadly weapon, particularly given the description of the knife as a butter knife and the testimony that Martinez never got not close enough to Michael to stab him. However, given the unanimity requirement for answering “no,” they may have abandoned their positions or failed to raise their concerns. Jurors may not have reached unanimity had they not been required to do so. Because the

instructional error impacted the procedure jurors used, it is impossible to determine the “flawed deliberative process” had no impact whatsoever.

D. CONCLUSION

Because the court failed to read aloud to the jury the instruction defining assault, this Court should vacate Martinez’s conviction and remand for a new trial. Alternatively, Under Bashaw, this Court should vacate the deadly weapon finding and enhanced sentence.

DATED this 16 day of May, 2011.

Respectfully Submitted,

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

STATE OF WASHINGTON )

Respondent, )

vs. )

MARIO MARTINEZ, )

Appellant. )

COA NO. 41476-7-II

STATE OF WASHINGTON  
MAY 17 2011  
BY \_\_\_\_\_  
DEPUTY

**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 16<sup>TH</sup> DAY OF MAY 2011 I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KRAIG NEWMAN  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF MAY 2011.

x Patrick Mayovsky