

FILED

APR 29 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28273-2-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH E. SAM,

Appellant.

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

APPELLANT'S OPENING BRIEF

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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A. SUMMARY OF ARGUMENT

Joseph Sam spent the great snowstorm of December 2009 with his cousin and a few mutual friends. The snow in Spokane was almost impassable, so they spent some time drinking and playing pool at a local bar, and then returned to Mr. Sam's home, where they continued to drink and spend time together. Later that evening, after hours of reading poetry and listening to music together at his home, the complainant and Mr. Sam engaged in sexual relations.

Mr. Sam recalls that the complainant pushed his head into her lap, whereupon he complied with her request for oral sex. When the group of friends awoke the following morning, the mood of the house had changed, and the complainant began telling the others that Mr. Sam had taken advantage of her.

At trial, Mr. Sam testified that he had believed the complainant had consented to oral sex, since she had initiated it, and that she had been sufficiently alert to consent. Defense counsel's arguments during the trial were consistent with this defense; however, due to attorney negligence, counsel failed to provide the reasonable belief instruction to the trial court. Counsel's ineffectiveness deprived the jury of the tools it needed to

understand a critical component of the defense, essentially nullifying the consent defense.

In addition, the trial court proceeded to sentence Mr. Sam on an incorrect criminal history and offender score, resulting in an unauthorized sentence.

B. ASSIGNMENTS OF ERROR

1. Mr. Sam did not receive the effective assistance of counsel required by the federal and state constitutions because his attorney did not request a jury instruction on a statutory affirmative defense supported by facts elicited at trial.

2. The trial court erred by sentencing Mr. Sam based upon a determination of his criminal history that the parties knew was not accurate at the time. Mr. Sam was thus denied due process, because he was sentenced based upon miscalculations in his criminal history and his offender score.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has the constitutional right to effective assistance of counsel at trial, and defense counsel is responsible for investigating the facts and law of the case. Mr. Sam's sole defense was that he reasonably believed that the complaining witness had consented to sexual relations. This was consistent

with Mr. Sam's testimony, with testimony that defense counsel elicited on cross-examination, and with counsel's arguments. RCW 9A.44.030(1) provides a statutory defense where lack of consent is based solely upon a victim's mental incapacity or physical helplessness, and the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless. Was Mr. Sam's constitutional right to counsel violated when his attorney failed to provide an instruction on the statutory defense?

2. The Sentencing Reform Act requires the State to prove a defendant's criminal history and his offender score by a preponderance of the evidence. Where the State failed to meet its burden and the record fails to support Mr. Sam's criminal history and offender score calculation, does the violation of Mr. Sam's due process rights require that he be resentenced?

D. STATEMENT OF THE CASE

On December 18, 2009, the Spokane area experienced an enormous snowstorm that shut down the community overnight. RP 98, 142-43; 2RP 334. On the night of December 18th, the complainant arrived with some friends from Omak to spend time at the home of appellant Joseph Sam. RP 135-36. The complainant had previously spent several weekends in Spokane, visiting an ex-

boyfriend and other friends, and stated that she had been out drinking with Mr. Sam a “handful” of times before. RP 136-37. The complainant was driven to Spokane by Mr. Sam’s cousin, Justin Sam, and the group of friends was completed by Andrew “Bear” James, a close friend of the complainant. RP 96. All members of the group were members of the Native American community. 2RP 328.

Each of the young people discussed the heavy drinking that occurred on the night of December, 18, 2009. RP 102, 147-55; 2RP 337-39. The group of friends, including the complainant and Mr. Sam, socialized together and spent the evening preceding the sexual encounter at a local bar named Jack and Dan’s, and then at Mr. Sam’s home. RP 102-107, 147-55; 2RP 337-41. The complainant testified that once she, Mr. Sam, and Mr. James returned from the bar, they sat and listened to music and read poetry on her laptop. RP 154. The complainant admitted that she later found her own pants on the bathroom floor of Mr. Sam’s house, RP 182, and awoke in the morning wearing a pair of basketball shorts belonging to Mr. Sam. RP 163.

Mr. Sam said that after the complainant put on Mr. Sam’s shorts, she started caressing his penis with her feet and initiating

the sexual acts that ensued, specifically guiding his hand to her vaginal area, and encouraging him to perform oral sex, a request with which he complied. 2RP 342. In addition, Mr. Sam stated that when he interrupted the complainant's advances in order to retrieve a condom from his bedroom, the complainant turned cold and aloof, turning her back to him. 2RP 343-44. Mr. Sam then left the complainant lying on the couch, returned to his bedroom to sleep, and penile-vaginal sexual intercourse never occurred. 2RP 343-44. There was no physical evidence of penetration or semen. 2RP 258-66.

Defense counsel did not propose that a reasonable belief instruction be given, nor did he object to the court's jury instructions as given. 2RP 398-99.¹

After a jury trial before the Honorable Annette S. Plese, Mr. Sam was convicted of rape in the second degree and theft of a

¹ During the court's on-record jury instruction discussion, defense counsel intended to provide the trial court with the reasonable belief instruction, but his copy of WPIC 19.03 stuck to his lesser-included offense instruction, which he ultimately declined to offer. Due to defense counsel's error, and due to this negligence alone, was the instruction not proposed. Telephone conversation with Kenneth Knox, Defense Trial Counsel. (Jan. 12, 2010).

motor vehicle, for the apparent unauthorized use of his cousin's car. CP 119-32.²

At sentencing, Mr. Sam objected to his criminal history and offender score calculation. 2RP 464; CP 64. The trial court ruled that he had made his record, but held that Mr. Sam's offender score was a "9.5." CP 121. The court sentenced him to a standard range sentence of 250 months. CP 121.

Mr. Sam timely appeals. CP 133-34.

² The verbatim report of proceedings includes two volumes. The volume from June 1-3, 2009, is referred to as RP. The volume from June 4, 8, 2009, and July 16, 2009, is referred to as 2RP.

E. ARGUMENT

1. MR. SAM DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS

RCW 9A.44.030(1) provides a statutory defense where lack of consent is based solely upon a victim's mental incapacity or physical helplessness, and the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless. Mr. Sam's attorney presented the defense that Mr. Sam reasonably believed that the complainant was intoxicated, but not so incapacitated that she did not consent to sexual relations.

Mr. Sam's testimony and the cross examinations of the State's witnesses, as well as defense counsel's opening and closing arguments tracked the statutory affirmative defense. Defense counsel, however, did not offer a jury instruction on the statutory defense and thus the jury never had the opportunity to consider it. Mr. Sam's conviction must be reversed because counsel violated his constitutional right to effective assistance of counsel.

a. Mr. Sam had the constitutional right to effective assistance of counsel. A criminal defendant has the constitutional

right to the assistance of counsel.³ U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

³ The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment states in part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Article I, Section 22 provides in part, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

Under Strickland, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109.

A lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. Strickland, 466 U.S. at 690. In reviewing the first prong of the Strickland test, appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

b. Defense counsel was ineffective for failing to offer an instruction on the statutory affirmative defense. Mr. Sam was charged with rape in the second degree, RCW 9A.44.050(1)(b)

(incapable of consent because “mentally incapacitated” or “physically helpless”). CP 27-28.

The legislature has provided a statutory defense to such a charge of rape in the second degree. RCW 9A.44.030(1) provides an affirmative defense, where a reasonable person in the defendant’s position would have believed that at the time of the offense, the victim was not mentally incapacitated and/or physically helpless. RCW 9A.44.030(1); State v. Powell, 150 Wn. App. 139, 153, 206 P.3d 703 (2009). The statute reads:

In any prosecution under this chapter in which lack of consent is based solely upon the victim’s mental incapacity or upon the victim’s being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

RCW 9A.44.030(1).

A pattern jury instruction, WPIC 19.03, mirrors the statute.

11A Washington Practice: Washington Pattern Jury Instructions: Criminal, 19.03 at 296-97 (2008) (WPIC). The pattern instruction provides:

It is a defense to the charge of rape in the second degree that at the time of the acts the defendant reasonably believed that [name of person] was not [mentally defective], mentally incapacitated or physically helpless.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

Id.

The defendant in a criminal case has the right to a correct statement of the law and to have the jury instructed on a defense that is supported by substantial evidence. Thomas, 109 Wn.2d at 228; Powell, 150 Wn. App. at 154. To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts necessarily review three questions: (1) was the defendant entitled to the instruction; (2) was the failure to request the instruction tactical, and (3) did the failure to offer the instruction prejudice the defendant. Powell, 150 Wn. App. at 154-58; State v. Kruger, 116 Wn. App. 685, 691, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003).

i. An instruction concerning the statutory reasonable belief instruction would have been given if offered. To warrant the statutory reasonable belief instruction, Mr. Sam simply needed to produce some evidence to support it. Powell, 150 Wn. App. at 154. In determining if the defendant has met this burden, the court must review the entire record in the light most favorable to the defendant, keeping in mind that the jury, not the court, weighs the evidence and determines witness credibility. State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006).

Mr. Sam's counsel elicited ample evidence, both on direct and cross-examination, that supported an instruction on the reasonable belief defense. The evidence established that all of the young people involved in the incident on December 18, 2009, were drinking heavily together. RP 102, 147-55; 2RP 337-39. Evidence also was presented that the group of young people, including the complainant and Mr. Sam, socialized together and spent the evening preceding the sexual encounter at Jack and Dan's, and then at Mr. Sam's home. RP 102-107, 147-55; 2RP 337-41. The complainant testified that once she, Mr. Sam, and Mr. James returned from the bar, they sat and listened to music and looked at

poetry on her laptop. RP 154. The complainant admitted that she later found her own pants on the bathroom floor of Mr. Sam's house, where the evidence suggested she removed them herself, RP 182, and awoke wearing a pair of basketball shorts belonging to Mr. Sam. RP 163.

Through Mr. Sam's testimony, the jury learned that after the complainant put on Mr. Sam's shorts, she started caressing his penis with her feet and initiated the sexual acts that ensued, specifically digital penetration and oral sex. 2RP 342. In addition, Mr. Sam stated that when he interrupted the complainant's advances in order to retrieve a condom from his bedroom, the complainant turned cold and distant, turning her back to him. 2RP 343-44. Mr. Sam left the complainant lying on the couch, returned to his bedroom to sleep, and no further sexual contact occurred. 2RP 343-44. There was no physical evidence of penetration or semen. 2RP 258-66.

The reasonable belief defense was clear from defense counsel's opening and closing arguments and from the testimony elicited on direct and cross-examinations. The evidence presented at trial supported the reasonable belief defense, and the trial court would have given the instruction if it had been offered.

ii. Mr. Sam's trial attorney did not offer the reasonable belief defense instruction due to negligence. Defense counsel must, "at a minimum, conduct a reasonable investigation" in order to make informed decisions about how to best represent his client. In re Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (emphasis deleted) (quoting In re Brett, 142 Wn.2d 868, 873, 142 P.3d 601 (2001)). "This includes investigating all reasonable lines of defense," including the relevant law. Davis, 152 Wn.2d at 721 (citing Morrison, 477 U.S. at 384) (finding counsel's failure to file suppression motion ineffective); Powell, 150 Wn. App. at 155. See American Bar Association, Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3rd ed. 1993).

Defense counsel is ineffective for failing to propose an instruction that assists the jury in understanding a critical component of the defense. "Where counsel in a criminal case fails to advance a defense authorized by statute, and there is evidence to support the defense, defense counsel's performance is deficient." In re Hubert, 138 Wn. App. 924, 926, 158 P.3d 1282 (2007); Thomas, 109 Wn.2d at 226-27 ("a reasonably competent attorney would have been sufficiently aware of the relevant legal

principles to enable him or her to propose an instruction based on pertinent cases”); Kruger, 116 Wn. App. at 693-95 (attorney’s failure to provide diminished capacity instruction in assault case rendered defense “impotent”).

This Court has found trial counsels’ performances were deficient for not proposing the reasonable belief defense in factually similar cases, in prosecutions for the rape of a person who was mentally incapacitated when there was evidence to support the instruction. Powell, 150 Wn. App. at 154-55; Hubert, 138 Wn. App. at 929-30. In Hubert, as here, there was evidence to show the complaining witness was awake during the sexual encounter and the defendant ended the encounter as soon as the complainant requested. Id. at 926-27, 929. Defense counsel in Hubert confessed he was not familiar with the statutory defense, and this Court granted Hubert’s personal restraint petition because there was no legitimate tactical reason for defense counsel to fail to propose the instruction. Id. at 929, 932. “An attorney’s failure to investigate the relevant statutes under which his client is charged cannot be characterized as a legitimate tactic.” Id. at 929-30.

Similarly, this Court found in Powell that trial counsel’s failure to request a reasonable belief instruction was deficient

performance because, with the exception of the complaining witness, the State's witnesses did not testify that she appeared too drunk or otherwise incapacitated to make decisions. Powell, 150 Wn. App. at 154. Defense counsel's closing argument indicated that he may have been aware of the reasonable belief defense, but this Court found no reasonable tactical basis not to propose the instruction. Id. at 155.

But we are aware of no objectively reasonable tactical basis for failing to request a "reasonable belief" instruction when (1) the evidence supported such an instruction, (2) defense counsel, in effect, argued the statutory defense, and (3) the statutory defense was entirely consistent with the defendant's theory of the case. Thus, as in Hubert, we hold that failure to request such an instruction under these circumstances was deficient performance.

Id.

Here, Mr. Sam's counsel was aware of the reasonable belief instruction, but neglected to present it to the court for the jury's consideration.⁴ While defense counsel did not specifically argue the statutory defense by name in closing, he did argue that Mr. Sam believed the complainant consented. 2RP 440. Given Mr.

Sam's defense, the reasonable belief instruction was entirely consistent with Mr. Sam's defense and would have given the jury the tools it needed to evaluate the evidence. A reasonably competent attorney would have thoroughly read the rape statute prior to trial, reviewed the pattern jury instruction, and been sufficiently aware of the statutory defense to enable him to propose a reasonable belief instruction properly. Given the facts of this case and the defense presented, defense counsel's failure to propose an instruction on the statutory defense was deficient performance.

iii. Mr. Sam was prejudiced by the failure of his attorney to propose a reasonable belief instruction. Mr. Sam was entitled to a reasonable belief instruction, as there was evidence that, at the time of the offense, the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

⁴ When the court reviewed the trial attorneys' proposed jury instructions, defense counsel withdrew his request for the lesser included offense of rape in the third degree. 2RP 398. In doing so, defense counsel's copy of WPIC 19.03, the reasonable belief instruction, stuck to his lesser-included offense instruction, and he rested without providing the instruction as he had intended. Telephone conversation with Kenneth Knox, Defense Trial Counsel. (Jan. 12, 2010). Due to defense counsel's error, and due to his negligence alone, the instruction was not proposed.

The jury, however, did not have the opportunity to determine this, because they were not provided with instructions on the statutory defense. Although defense counsel argued that Mr. Sam believed that the complainant had consented to sexual relations, the jury did not have the affirmative defense that would (1) allow them to recognize and to weigh the legal significance of the evidence, and would (2) allow them to acquit Mr. Sam if they concluded that he reasonably believed the complainant was not mentally incapacitated or physically helpless. See Powell, 150 Wn. App. at 156. Thus, it would have appeared to the jury that it had no alternative but to convict Mr. Sam if it found beyond a reasonable doubt that the complainant had been mentally incapacitated or physically helpless, regardless of whether it also found that Mr. Sam reasonably believed that she had consented. The absence of this instruction essentially nullified his defense. See Powell, 150 Wn. App. at 156. Mr. Sam was thus prejudiced by his lawyer's deficient performance.

c. Mr. Sam's conviction must be reversed. Mr. Sam did not receive a fair trial because his attorney did not propose an instruction concerning the statutory defense that, at the time of the offense, the defendant reasonably believed the victim was not

mentally incapacitated and/or physically helpless. This Court should reverse his conviction and remand for a new trial. Thomas, 109 Wn.2d at 229, 232; Powell, 150 Wn. App. at 157-58.

2. THE COURT MISCALCULATED MR. SAM'S CRIMINAL HISTORY AND OFFENDER SCORE.

a. Due process requires that the State bear the burden of proving an individual's criminal history and offender score. At a sentencing hearing under the Sentencing Reform Act (SRA), the State must prove an individual's criminal history and offender score calculation by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); RCW 9.94A.530. RCW 9.94A.500(1) requires that the sentencing court make the determination, by a preponderance of the evidence, of the nature and extent of an individual's criminal history. When the record does not support the criminal history and offender score calculation, the error may be raised on appeal even if no objection was raised below. Id. at 484-85; In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

b. The trial court used an incorrect criminal history and offender score and imposed an unauthorized sentence. A sentence must be authorized by the legislature "because it is the

legislature's sole province to fix legal punishments." State v. Motter, 139 Wn. App. 797, 801, 162 P.2d 1190 (2007), rev. denied, 163 Wn.2d 1026 (2008) (citing State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007)). The judgment and sentence is the final sentencing order establishing the terms of the sentence. In re West, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005). The plain language in the judgment and sentence carries the full weight of the trial court's sentencing authority. West, 154 Wn.2d at 207.

The judgment and sentence lists the criminal history used to calculate Mr. Sam's offender score. It lists six prior adult non-violent felony convictions, three non-violent juvenile adjudications, and one misdemeanor conviction, but finds that Mr. Sam has an offender score of "9.5." CP 121. On a document entitled "prosecutor's understanding of defendant's criminal history," it is noted in the judge's handwriting that [Mr. Sam] did not agree, but [deputy prosecuting attorney] proved," and "see record," with the judge's initials. CP 64.

During the sentencing hearing, Mr. Sam raised objections to the calculation of his offender score, and to the accuracy of his criminal history. 2RP 456-64. The trial court noted his objections on the record and on the State's written understanding of criminal

history. 2RP 464; CP 64. The trial court, however, reminded Mr. Sam that when previously confronted with his criminal history in 2005, Mr. Sam had failed to object to the calculation of his offender score. 2RP 461-64. The court chided Mr. Sam for stipulating to the juvenile record in 2005, stating that he had waived his right to object to any future miscalculations in his offender score. Id. This was error.

In Goodwin, the defendant pled guilty and signed a plea agreement that he was agreeing to the prosecution's statement of his criminal history. 146 Wn.2d at 864. The offender score included a prior conviction that should have washed out based on a gap in time between convictions and the defendant's age. The Goodwin Court rejected the State's efforts to preclude Goodwin from being resentenced based on an accurate offender score, because "a defendant cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that authorized by statute and thus cannot waive a challenge to such a sentence." Id. at 872. The Court took "the opportunity to clarify the law," and ruled that "a defendant cannot agree to punishment in excess of that which the Legislature has established." Id. at 873-74.

Likewise, Mr. Sam could not empower a court to disregard its sentencing authority and impose a sentence that is not permitted under the sentencing statutes. Even if each of the convictions attributed to him was accurate, which he does not concede, the court's judgment and sentence set out six prior felony convictions for Mr. Sam, three juvenile adjudications (1.5), and the two instant convictions, which counts as one point under RCW 9.94A.525. Mr. Sam's correct offender score was therefore only "8." RCW 9.94A.510 (Table 1); RCW 9.94A.515 (Table 2); RCW 9.94A.525; RCW 9.94A.530.

An offender score of "9.5" authorizes a standard range of 210-280 months, whereas the correct offender score of "8" results in the lower standard range of 185 to 245 months.

Where the judgment and sentence does not authorize any additional criminal history or reason to elevate Mr. Sam's sentence, the judgment and sentence is invalid on its face and Mr. Sam's sentence exceeds the standard range. See Ford, 137 Wn.2d at 485. The necessary remedy is to remand the case for a correct standard range sentence. Id.

F. CONCLUSION

For the foregoing reasons, Mr. Sam respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 27th day of April, 2010.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorney for Appellant

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

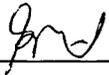
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 28273-2-III
v.)	
)	
JOSEPH SAM,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY, DPA	(X)	U.S. MAIL
SPOKANE COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
1100 W. MALLON AVENUE	()	_____
SPOKANE, WA 99260-0270		
[X] JOSEPH SAM	(X)	U.S. MAIL
C/O ATTN: CORDLE, CEDAR HALL	()	HAND DELIVERY
DAYTON AIRPORT ROAD	()	_____
PO BOX 900		
SHELTON, WA 98584		

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF APRIL, 2010.

X _____ 

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