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STATE OF WASHINGTON
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NO. 31557-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BRIAN ZANE WOMAC, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to dismiss the convictions for murder in the second degree and assault in the first degree, having found that both constituted double jeopardy to the conviction for homicide by abuse.
2. The trial court erred by finding that murder in the second degree, although double jeopardy, was a “valid conviction.” CP 37, Decree No. 2.
3. The trial court erred by finding that assault in the first degree, although double jeopardy, was a “valid conviction.” CP 38, Decree No. 5.
4. The trial court erred by making findings in support of an exceptional sentence that were not found by a jury beyond a reasonable doubt. CP 39-43, Findings of Fact Nos. 4-8, 15-18.
5. The trial court erred by imposing an exceptional sentence based on facts that were not found by a jury beyond a reasonable doubt. CP 43, Conclusions of Law Nos. 1-3.
6. The trial court erred by denying the defense motion to exclude ER 404(b) prior bad act evidence that Mr. Womac had been physical with his other two sons.

7. A State medical expert's testimony that the victim's injuries were not accidental "beyond a reasonable doubt" was an impermissible comment on Mr. Womac's guilt and violated due process protections.
8. The trial court erred by denying the defense motion for mistrial when the State had repeatedly used a baby doll as an illustration of facts not in evidence to inflame the prejudices of the jury.
9. Mr. Womac was deprived of his constitutional right to a fair trial due to the cumulative effect of the errors in his trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it found that Mr. Womac's convictions for murder in the second degree and assault in the first degree constituted double jeopardy to his conviction for homicide by abuse, yet refused to dismiss the erroneous convictions?
2. Was the trial court's imposition of an exceptional sentence based on findings not made by a jury beyond a reasonable doubt a violation of the federal constitution under the controlling authority of *Blakely*?
3. Did the trial court err when it denied the defense motion to exclude testimony referring to Mr. Womac's past unrelated conduct toward his other children?
4. Did cumulative error deprive Mr. Womac of his right to a fair trial?

III. STATEMENT OF THE CASE

Mr. Brian Womac's three convictions arose from one incident. On December 1, 2002, at around 2:45 p.m., Mr. Womac's and his girlfriend, Christa Owings, brought their son, Anthony Owings, to the emergency room with a head injury. RP2 130. Unfortunately, the skull fracture the baby had sustained caused a subdural hematoma that eventually led to his death. RP4 516.

On the day of Anthony's injury, Mr. Womac had cared for Anthony since early that morning. RP3 271. Mr. Womac's account of the accident that led to Anthony's injury never changed. Mr. Womac said that Anthony fell from his arms as he reached into his crib to get a blanket. RP3 284. After Anthony fell, Mr. Womac administered CPR, and then placed his other two children and Anthony in the car to take him to Olympia to pick up the child's mother. RP3 285. Ms. Owings is a nursing assistant and was working across the street from a hospital. After picking up Ms. Owings, the couple drove Anthony across the street to the hospital. RP3 278.

Mr. Womac was charged with three crimes arising from Anthony's death: homicide by abuse, felony murder in the second degree based on the predicate offense of criminal mistreatment in the first or second

degree, and assault of a child in the first degree. CP 5-6. The defense showed through medical testimony that both the skull fracture and the subdural hematoma could have been caused by a short fall as Mr. Womac described. RP4 597, 622, 631. The State attempted to show through medical testimony that Mr. Womac's account of the accident was inconsistent with Anthony's injuries.

In the end, the jury convicted Mr. Womac of all three charges. CP 14, 15, Supp CP. Mr. Womac objected, asserting that in view of the conviction for homicide by abuse, the convictions for felony murder in the second degree and assault in the second degree constituted double jeopardy. RP6 1035-43. The State conceded that the murder in the second degree conviction did constitute double jeopardy and that, at a minimum, all three charges constituted the same criminal conduct. RP6 1034-35. The court found that, in view of the homicide by abuse conviction, both the murder in the second degree and the assault in the first degree convictions constituted double jeopardy. RP6 1042-43. However, the court found that this conclusion required only that no sentence be imposed on the erroneous convictions and refused, over defense objection, to dismiss the convictions for homicide by abuse and assault in the first degree. RP6 1042-43, CP 28, 37.

In sentencing Mr. Womac on murder in the second degree, the court found that on an offender score of zero, the standard range for the conviction was 240-320 months. CP 28. But the trial court imposed an exceptional sentence of 480 months, making factual findings in support of two legal justifications for the exceptional sentence: particular vulnerability of the victim due to extreme youth, and abuse of a position of trust. CP 30, 43.

This appeal timely followed.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED WHEN IT FOUND THAT MR. WOMAC'S CONVICTIONS FOR MURDER IN THE SECOND DEGREE AND ASSAULT IN THE FIRST DEGREE CONSTITUTED DOUBLE JEOPARDY TO HIS CONVICTION FOR HOMICIDE BY ABUSE, YET REFUSED TO DISMISS THE ERRONEOUS CONVICTIONS.

Following the conviction of Mr. Womac on all three charges, CP 14, 15, Supp CP, Mr. Womac objected, asserting that in view of the conviction for homicide by abuse, the convictions for felony murder in the second degree and assault in the second degree constituted double jeopardy and must therefore be dismissed. RP6 1035-43. The State conceded that the murder in the second degree conviction did constitute double jeopardy and that, at a minimum, all three charges constituted the same criminal conduct. RP6 1034-35.

The court found that in view of the homicide by abuse conviction, both the murder in the second degree and the assault in the first degree convictions constituted double jeopardy. RP6 1042-43. However, the court found that this conclusion required only that no sentence be imposed on the erroneous convictions and refused, over defense objection, to dismiss the convictions for homicide by abuse and assault in the first degree. RP6 1042-43, CP 28, 37. The court's written findings erroneously concluded that both the murder in the second degree conviction and the assault in the first degree convictions were "valid convictions," despite the conclusion that they were double jeopardy. CP 37.

Once a conviction is found to be double jeopardy, the constitution requires the dismissal of that conviction. A double jeopardy violation occurs at the inception of trial, which is why an order denying a motion to dismiss on double jeopardy grounds is immediately appealable. *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). "[T]he double jeopardy clause protects an individual against more than being subjected to double punishments. It is a guarantee against twice being put to trial for the same offense." *Abney*, at 660-61. Once the court determines that the multiple convictions violate double jeopardy, both the conviction and sentence for the erroneous charges are vacated. *See e.g.*

State v. Schwab, 98 Wn. App. 179, 190, 988 P.2d 1045 (1999); *State v. Read*, 100 Wn. App. 776, 793, 998 P.2d 897 (2000).

The State has not appealed the court's conclusion that both the murder in the second degree and the assault in the first degree convictions constituted double jeopardy. The court was in fact correct to so find.

"The guaranty against double jeopardy protects against multiple punishments for the same offense." *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing *Whalen v. United States*, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)). Though the guaranty speaks of punishments, it is clear from precedent that "punishment" includes not just the sentence, but the conviction itself. The way the court analyses if the legislature has authorized "multiple punishments" for the same offense is to look at the statutes defining the crimes charged. See *State v. Schwab*, 98 Wn. App. 179, 182-83, 988 P.2d 1045 (1999).

Therefore, it was error for the trial court in this case to refuse to dismiss the two convictions that violated the double jeopardy clause. Both the conviction for second degree murder and the conviction for first degree assault should be dismissed.

ISSUE 2: UNDER THE CONTROLLING AUTHORITY OF *BLAKELY V. WASHINGTON*, THE TRIAL COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED ON FINDINGS NOT MADE BY A JURY BEYOND A REASONABLE DOUBT VIOLATED OF THE CONSTITUTION.

The exceptional sentence imposed in this case is unconstitutional under the controlling authority of *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (June 24, 2004), 2004 WL 1402697 and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Sixth and Fourteenth Amendments dictate 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.” *Apprendi*, 530 U.S. at 490. *Blakely* held that:

the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts [beyond those necessarily comprised in the guilty verdict], but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the [guilty] verdict alone does not allow, . . . the judge exceeds his proper authority.

Blakely, __ U.S. __ (June 24, 2004), slip op. at 7. This means that any “aggravating fact” other than the fact of a prior conviction that would support an exceptional sentence upward must be proven to a jury beyond a reasonable doubt or admitted by the defendant. *Id.* at 9.

In this case, all of the facts the court found to support an exceptional sentence were facts that were not necessary to the convictions

imposed by the jury and therefore were not found by a jury beyond a reasonable doubt. *Blakely* has expressly found that a sentence imposed under that procedure is unconstitutional. Therefore, Mr. Womac's exceptional sentence must be found unconstitutional.

The error cannot be harmless. The State Supreme Court has already held that errors under *Apprendi* cannot be harmless. *See State v. Thomas*, 150 Wn.2d 821, 847 (2004) ("We may not undertake a harmless error analysis" if *Apprendi* is violated.). Therefore, there is no harmless error under *Blakely* either, because *Blakely* merely interprets the application of *Apprendi*'s ruling to the exceptional sentence process in Washington.

Blakely and *Apprendi* apply to Mr. Womac, even though he did not raise this issue below. An appellant may raise a constitutional issue for the first time on appeal. RAP 2.5(a)(3). Furthermore, new precedent applying to the conduct of prosecutions applies retroactively to all cases pending on direct review or not yet final, "with no exception for cases in which the new rule constitutes a clear break from the past." *In re Personal Restraint Petition of St. Pierre*, 118 Wn.2d 321, 326 (1992); accord *State v. Hanson*, ___ Wn.2d ___, 2004 WL 1348736 (June 17, 2004).

Therefore, under *Blakely* and *Apprendi*, Mr. Womac is entitled to a reversal of his exceptional sentence and remand for re-sentencing.

ISSUE 3: THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION TO EXCLUDE TESTIMONY REFERRING TO MR. WOMAC'S CONDUCT TOWARD HIS OTHER CHILDREN.

The trial court erred when it permitted the State to introduce testimony purporting to show that Mr. Womac had spanked or hit his other two sons in the past. None of these prior incidents resembled the State's theory of how Anthony became injured and none of these prior incidents led to serious injury or death. In short, there was no relevance of these prior incidents other than to try to show that Mr. Womac was a "bad man" who had some propensity to abuse his children.

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The admission of evidence under ER 404(b) is also subject to the limitations of ER 402 and ER 403 as to relevance and prejudice. Thus, even if evidence of prior crimes falls under one of the exceptions recognized in ER 404(b), it should not be admitted if the prejudice clearly outweighs the probative value. *State v. Bacotgarcia*, 59 Wn. App. 815, 819, 801 P.2d 993 (1990), review denied, 116 Wash.2d 1020 (1991). The purpose of ER 404(b) is to prohibit the introduction of evidence which

could lead a jury to determine that a defendant committed the crime with which he or she is charged simply because he or she committed a similar crime in the past. However, in recognition that evidence of prior crimes may be particularly relevant to certain specific issues, such as proof of motive, intent or identity, ER 404(b) allows its admittance if its probative value outweighs its prejudice. See 1 John William Strong, McCormick on Evidence sec. 190, at 798 (4th ed. 1992). ER 404(b) rulings are to be reviewed under an abuse of discretion standard. *Bacotgarcia*, 59 Wash.App. at 824, 801 P.2d 993.

In this case, Mr. Womac's ex-wife, Michelle Womac, was allowed to testify that in 2001 she reported a bruise on her 3-year-old son's leg, which she had noticed after he returned from a visit with Mr. Womac. RP3 328-331. Ms. Womac testified that her son told her Mr. Womac had hit him. RP3 331-32. Ms. Womac said that when she asked Mr. Womac about it, he said he had spanked the child. RP3 342.

Kim Womac, Mr. Womac's other ex-wife, was called to testify that in 1990 Mr. Womac had spanked their infant son when he cried. RP3 354. Although Ms. Womac never saw Mr. Womac spank their son, she testified that Mr. Womac told her he had. RP3 355. In addition, she testified that in 1991 or 1992, Mr. Womac had hit their 18-month-old son "a couple of times" and told him to "shut up" when he kept them up with

his crying. RP3 358.

Prior to trial, the defense had asked the court to exclude the above testimony, objecting that under ER 404(b) and ER 403, this was propensity evidence and its prejudicial effect outweighed any limited probative value. RP1 16. The court ruled that the prior incidents with Mr. Womac's other children were admissible to show motive, intent, and absence of mistake or accident. RP1 70.

a. This prior bad act evidence was admitted for the improper purpose of showing propensity to commit crime.

Evidence of dissimilar acts of abuse against Mr. Womac's other children do not show his motive to intentionally harm Anthony. Our state Supreme Court has defined the word "motive" to mean "[a]n inducement, or that which leads or tempts the mind to indulge [in] a criminal act." *State v. Tharp*, 96 Wash.2d 591, 597, 637 P.2d 961 (1981), (quoting *Black's Law Dictionary* 1164 (4th rev. ed. 1968)). It is difficult to ascertain how these unproven prior assaults on Mr. Womac's other two sons could be a motive or inducement for his later supposed assault on Anthony. There is no contention that the last assault was carried out in order to conceal the prior crimes. The earlier assaults had no logical relevance to Mr. Womac's motive for the last assault. Therefore, the trial court erred by admitting these prior acts as proof of motive.

Moreover, because the prior acts introduced in this case bear no relationship to facts of this case, it is hard to see how they can be at all relevant to intent or prove absence of mistake. The State argued in this case that Mr. Womac had deliberately “bashed” the victim into a wall or floor. RP6 957. In closing, the State argued that Mr. Womac’s prior treatment of his other children showed that “the defendant’s treatment of [the victim] is a pattern or practice of abuse. And it’s not accidental that [he] was treated in this fashion.” RP6 948.

Yet, the incidents described with Mr. Womac’s other children are hitting or spanking. There was no evidence that Mr. Womac had in the past thrown one of his children against a wall or the floor. There was no evidence that one of his children had been injured in the past and Mr. Womac had claimed that he dropped the child or that it happened by accident. There is nothing about these prior incidents that connects them in any way to the circumstances of Anthony’s death.

What makes this case different from cases in which prior acts of violence were ruled admissible is that the prior acts admitted in this case involved victims other than the victim of the crime charged. For example, in *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995), prior assaults against the defendant’s wife were admitted to show intent and motive in a trial accusing him of his wife’s murder. In *State v. Bell*, 10 Wn. App. 808,

881 P.2d 268 (1994), the State was allowed to introduce evidence of prior physical abuse of the same child he was accused of killing to show intent and absence of mistake or accident. Likewise, in *State v. Toennis*, 52 Wn. App. 176 (1988), the prior acts of violence admitted involved the same child.

Where prior acts involving a different victim were admitted, it was because the prior acts were so strikingly similar to the crime charged that it rose to the level of a *modus operandi*. For example, in *State v. Roth*, 75 Wn. App. 808, 881 P.2d 268 (1994), the defendant was charged with the murder of his wife, who he had heavily insured with policies in which he was the beneficiary. The defendant claimed his wife's death was an accident. The defendant's former wife, also heavily insured, died under similar circumstances. The court found that the facts of both deaths were so unique and unusual that they were not coincidental and therefore admitted to rebut a defense of accident. *Roth*, at 820. The court remarked:

Here, the marked similarities between the victims, the physical circumstances of the crimes, and the relatively complex nature of the crimes support a commences inference that the deaths of Roth's spouses were not mere fortuities. Both Janis Roth and the victim of the charged crime were single mothers, both married Roth after very short courtships, both obtained large life insurance policies after the marriage, and both died within a year of marrying Roth. Each death occurred during a recreational outing that

was planned by Roth so that he could be alone with the victim, and the location of each death was remote, with no witness nearby. Each killing was an orchestrated plot, predesigned to ensure the availability of a large life insurance policy and to cloak the victim's death with the appearance of accident. We are convinced that these similarities are sufficiently unusual to ensure that even a second recurrence would be objectively improbable.

Roth, at 820.

This case is clearly distinguishable from cases such as *Roth* where evidence of prior bad acts against other victims was deemed admissible. The prior acts in this case were dissimilar to the alleged crime against the victim. There are certainly no similarities that would demonstrate a *modus operandi*.

What the State attempted to show with this prior bad act evidence was that because of Mr. Womac's prior acts of violence against his other two sons, the jury could conclude that he has a propensity for anger and violence against children, and, therefore, he was violent in this case and guilty of the intentional killing of Anthony. This type of inference based on propensity is exactly what ER 404(b) is designed to forbid.

Therefore, this evidence should have been excluded as improper under ER 404(b).

b. Any limited probative value of this prior bad act evidence is outweighed by its prejudicial effect.

Furthermore, even if the prior acts were theoretically admissible under ER 404(b), the prejudicial effect far outweighed the probative value. “ER 404(b) must be read in conjunction with ER 402 and 403.” *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). ER 402 prohibits admission of evidence that is not relevant. Relevant evidence is defined in ER 401 as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. ER 403 requires the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Any doubts about admitting ER 404(b) evidence must be resolved in favor of exclusion. *State v. Bowen*, 48 Wn. App. 187, 738 P.2d 316 (1987).

The courts have recognized that in certain cases, evidence of prior bad acts carries even more likelihood of unfair prejudice. For example, in sex crime cases, the courts have been particularly careful about ER 404(b) evidence:

A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where prejudice potential of prior acts is at its highest.

Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.

State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Likewise, the chance of prejudice in a child abuse case is exceptionally high. Having been told by the witnesses that Mr. Womac has been assaultive with his children in the past, it would be difficult for the jury to come to an independent conclusion based on the facts proven in this case.

With the probative value of the prior acts in this case already in question (see above), it is also clear that the prejudicial effect of this evidence was unfair and the evidence should have been excluded.

ISSUE 4: CUMULATIVE ERROR DEPRIVED MR. WOMAC OF A FAIR TRIAL.

The combined effects of error may require a new trial even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).

In this case, there were several errors that combine to deprive Mr. Womac of his right to a fair trial.

- (1) *The State's witness impermissibly commented on his opinion as to Mr. Womac's guilt.* During direct examination, Dr.

Steven West, an expert medical witness for the state, testified that “*I am sure, no reasonable doubt, this didn’t occur from a ground level fall.*” RP2 204. The defense immediately objected. RP2 204. The court struck the testimony but did not give a corrective instruction to the jury. RP2 204.

No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference. *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); *State v. Haga*, 8 Wn.App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973). *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This type of opinion invades the jury’s independent determination of the facts and violates the defendant’s constitutional right to a fair trial before a jury. *State v. Farr-Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999).

In this case, the doctor’s testimony was of the most prejudicial nature in that he actually stated, indirectly, that Mr. Womac’s account of how his son suffered injury was a lie, beyond any “reasonable doubt.” The trial court’s failure to take further corrective action to remove that taint from the jury was error.

- (2) *Permitting the State to introduce evidence that Mr. Womac may have been physically abusive with his other sons.* This error is discussed in detail above. In a case as emotional as this one, allowing the State to in essence argue that Mr. Womac had a propensity to abuse children is unfairly prejudicial and certainly prejudiced Mr. Womac's right to a fair trial.
- (3) *Denying the motion for mistrial based on the State's repeated use of a baby doll as an "illustrative exhibit" for the sole purpose of inflaming the prejudices of the jury.* On the afternoon of the third day of trial, the State brought a baby doll to court and placed it on the table. The defense objected to the use of the doll on the grounds that the doll could not be qualified as an illustrative exhibit because there was no proof that it was substantially like the real item. RP4 633-34. This objection was ruled premature. RP4 634. During the course of cross-examination, the prosecutor grabbed the doll by the leg, flung it out as though against a wall, causing the doll's hat to fly off and land in front of the jury. RP5 698. Following

that the State repeatedly shook the doll or modeled the act of tossing it against a wall. RP5 698.¹ The prosecutor's actions with the doll were essentially a "re-creation" of the State's theory of how Anthony came to be injured, but without any foundation to show that this "re-creation" rose to the level of evidence.

The court found that the doll was an "illustrative exhibit," admitted it into evidence, and denied the motion for mistrial. RP5 710-712.

In a case such as this, where a very young child dies, the jury will be understandably emotional. In such a setting, for the prosecutor to reenact its theory graphically by abusing a proxy of the baby is overwhelmingly prejudicial.

Furthermore, the State laid out no foundation for this "illustrative exhibit" so show that it was in any way relevant to the case. Therefore, it was error to admit the doll into evidence and to permit the State to put on a show for the jury

¹ In this, as well as the other descriptions of what occurred with the doll, the record cannot show what actually happened. However, both counsel put on the record their recollections of what had happened. The State conceded that it had used the doll to illustrate throwing the baby into the wall, though it disputed the number of times this occurred. RP5 708. During the cross-

with it. That error caused unfair prejudice to Mr. Womac's right to a fair trial.

The cumulative effect of the above errors was so prejudicial as to deny Mr. Womac a constitutionally fair trial under the federal and state constitutions. Therefore, his conviction(s) should be reversed.

V. CONCLUSION

For the reasons stated above, Mr. Womac respectfully asks that this court reverse his convictions, or, in the alternative, reverse his exceptional sentence.

DATED: September 15th, 2004.

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examination of Dr. Plunkett, the defense objected to the use of the doll three times, at RP4 639, RP4 640, and RP4 684.

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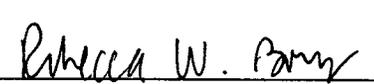
CERTIFICATE OF SERVICE

I certify that on the 15th day of September 2004, I caused a true and correct copy of this

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