

54805-1

54805-1

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No. 54805-1-I

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

STATE OF WASHINGTON,

v.

KEITH G. GEORGE,

Appellant.

FILED
2005 JUN 20 PM 4:38

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

The Honorable Charles W. Mertel

REPLY BRIEF OF APPELLANT

SARAH M. HROBSKY
GREGORY C. LINK
Attorneys for Appellant

WASHINGTON APPELLATE PROJECT
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A. ARGUMENT

1. WHEN THE CHARGE OF VIOLATION OF A RESTRAINING ORDER ON FEBRUARY 21, 2004, HAD PREVIOUSLY BEEN DISMISSED WITH PREJUDICE, THE SUBSEQUENT PROSECUTION FOR THE SAME OFFENSE VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY.

The prosecution in King County Superior Court of a charge of misdemeanor violation of a court order that previously had been dismissed with prejudice in Kent Municipal Court violated the constitutional prohibition against double jeopardy. When a charge is dismissed with prejudice, the Double Jeopardy Clause unequivocally prohibits retrial for the same offense. United States v. DiFrancesco, 449 U.S. 117, 129-30, 101 S. Ct. 426, 66 L.Ed.2d 328 (1980); Burks v. United States, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978); State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

The State argues jeopardy had not attached, on the grounds Mr. George had not waived his right to trial by jury and a jury had not been impaneled. Brief of Respondent at 15. In so arguing, the State ignores the unequivocal order of the municipal court of dismissal *with prejudice*. A dismissal with prejudice is “[a] term meaning an adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause.” Black’s

Law Dictionary 469 (6th ed. 1990). Thus, the court's order was an adjudication on the merits barring the subsequent prosecution in superior court.

The State contends the phrase "with prejudice" has "no talismanic quality," quoting Serfass v. United States, 420 U.S. 377, 95 S. Ct. 1055, 43 L.Ed.2d 265 (1975). Brief of Respondent at 18. In Serfass, however, the phrase "no talismanic quality" was used by the United States Supreme Court when considering whether an acquittal was an appealable order:

[T]he language of cases in which we have held that there can be no appeal from, or further prosecution after, an 'acquittal,' cannot be divorced from the procedural context in which action so characterized was taken. The word itself has no talismanic quality for purposes of the Double Jeopardy Clause.

420 U. S. at 392. Clearly, the United States Supreme Court was not considering whether a dismissal with prejudice was a bar to a subsequent prosecution. The State's application of the phrase to the municipal court's order in this case is without basis.

The State seems to argue the dismissal was akin to a pretrial Knapstad¹ motion in which a case is dismissed without prejudice, on the grounds that personal service is not an essential element of the offense. Brief of Respondent at 18-19. Nonetheless, double

¹ State v. Knapstad, 107 Wn.2d 346, 357, 729 P.2d 48 (1986).

jeopardy prohibits retrial regardless of whether the reviewing court agrees with the lower court's finding of insufficient evidence. Fong Foo v. United States, 369 U.S. 141, 143, 82 S. Ct. 671, 7 L.Ed.2d 629 (1962); State v. Corrado, 81 Wn. App. 640, 646-47, 915 P.2d 1121 (1996).

The State further argues the municipal court lacked authority to dismiss the charge because it was simultaneously pending in superior court. Brief of Respondent at 20-21. On the contrary, where a defendant is charged for the same offense in different courts, the court where the charge was first filed has priority.

If two or more charging documents are filed against the same defendant for the same offense in different courts, and if each court has jurisdiction, the court in which the first charging document was filed shall try the case.

CrRLJ 5.3

To support its argument regarding jurisdiction, the State cites City of Seattle v. Crockett, 87 Wn.2d 253, 551 P.2d 740 (1976) and State v. Wernick, 40 Wn. App. 266, 698 P.2d 573 (1985). Both cases, however, involved an issue of whether district court procedural rules were applicable to a case transferred from district court to superior court. Here, Mr. George does not allege the municipal court procedural rules were applicable after the case was

dismissed by the municipal court. The State's reliance on the cases is misplaced.

If the State wished to contest the municipal court's authority to dismiss this case, it could have petitioned the municipal court to vacate its facially valid order of dismissal. Here, however, the State chose to simply ignore the order altogether.

Mr. George's conviction for violation of a court order when the case had previously been dismissed with prejudice was in violation of the prohibition against double jeopardy. The conviction must be reversed and the charge dismissed with prejudice, again.

2. MR. GEORGE WAS NOT BROUGHT TO TRIAL ON THE CHARGE OF VIOLATION OF A COURT ORDER ON DECEMBER 22, 2003, WITHIN THE LIMITS OF THE TIME FOR TRIAL RULE.

a. The speedy trial issue is properly before this Court.

Mr. George timely asserted his right to trial within the time limits of the time for trial rule. As correctly noted in the State's brief, Mr. George brought the issue to the attention of his counsel, who, in turn, advised the court that he was specifically not waiving any claim to a speedy trial violation on the charge that was originally filed in Renton Municipal Court, Case Number 0033049. 2RP 4-5. Thus, the issue was clearly and timely raised to trial court, even though the

court offered defense counsel an opportunity to revisit the issue at a later date. RAP 2.5(a) limits review of an issue not raised in the trial court. Because Mr. George did raise the issue, the issue was preserved for appellate review by this Court.

b. The time for trial rule was violated, requiring dismissal with prejudice. Mr. George concedes he miscalculated the time for trial on the Renton Municipal Court charge, when he inadvertently failed to include in his calculation the time Mr. George was in custody but not transported to court and the additional 30 days allowed when he was released on his personal recognizance. Regardless, he was not brought to trial within the time limits of the time for trial rule.

Mr. George was arraigned on the charge in Renton Municipal Court on February 4, 2004. Brief of Appendix, Appendix B at 9. Because he was out of custody at that time, the expiration date was 90 days later, May 4, 2004. CrR 3.3(b)(2) and (4). On February 23, 2004, he was booked into Kent City Jail on the Kent Municipal Court charges. Appendix A at 1.² On March 1, 2004, Mr. George was not transported for a pre-trial conference in Renton, and the court issued

²Attached herein as Appendix A is the complete docket from Kent Municipal Court, Case Number K43924FV. In the Brief of Appellant, only part of the docket was attached as Appendix A.

a bench warrant. Brief of Appellant, Appendix B at 9. On March 8, 2004, Renton was notified he was in custody in Kent. Brief of Appellant, Appendix B at 9. On March 12, 2004, he was transported to Renton Municipal Court, which date was adopted as the new commencement date with an expiration date of May 11, 2004. Brief of Appellant, Appendix B at 9-10.

Mr. George remained in custody on the Renton charge until May 6, 2004, at which time he was released on his personal recognizance, a pre-trial conference was scheduled and the expiration date was reset to June 10, 2004. Brief of Appellant, Appendix B at 11. On May 7, 2004, the Renton Municipal Court noted Mr. George remained in custody on other charges and would need to be transported for the pre-trial conference. Brief of Appellant, Appendix B at 11. On May 17, 2004, Mr. George again was not transported and the court issued another bench warrant, even though all parties were well aware of Mr. George's custodial status. Brief of Appellant, Appendix B at 11-12. On May 24, 2004, the Renton Municipal Court was advised Mr. George had been transferred to King County Jail. Brief of Appellant, Appendix B at 12. On June 4, 2004, he was transported to Renton for a pre-trial conference, at which time the court again reset the commencement

date. Brief of Appellant, Appendix B at 12-13. On June 15, 2004, the Renton Municipal Court granted the prosecutor's motion to dismiss the charge, in anticipation of refiling the charge in King County Superior Court. Brief of Appellant, Appendix B at 13. On July 13, 2004, the charge was refiled in King county Superior Court, defense counsel's speedy trial objection was denied, and the case proceeded to trial. 2RP 4-5.

The trial court erred both times it reset the commencement date. Mr. George was in custody in King County both on March 1, 2004, and on May 17, 2004, and, therefore, he did not fail to appear for purposes of the time for trial rule. "A defendant has no duty to bring himself to trial[,] rather, the defendant's appearance in court 'depends on the efforts of the prosecutor and law enforcement officials' (citations omitted)." City of Seattle v. Guay, 150 Wn.2d 288, 296, 76 P.3d 231 (2003). The State has an obligation to exercise "due diligence" to bring a defendant to court. State v. Hessler, 123 Wn. App. 200, 204, 98 P.3d 64 (2004). "Due diligence requires the State to act on any leads regarding the whereabouts of a defendant who is amendable to process." Id.

Even assuming, *arguendo*, the court did not know Mr. George's whereabouts on March 1, 2004, and the commencement

date was appropriately reset on March 12, 2004, the docket clearly reflects all parties were aware of his location on May 17, 2004. Brief of Appellant, Appendix B at 11-12. In fact, on May 7, 2004, the day after he was released on his personal recognizance and the expiration was reset for June 10, 2004, a docket entry indicates he needed to be transported to the next scheduled hearing. Brief of Appellant, Appendix B at 11. Because Mr. George was not transported, he did willfully fail to appear and the court erred in issuing a bench warrant and in resetting the commencement date. To hold otherwise would be to condone abuse of the time for trial rule; a defendant could be caught in a never-ending cycle of being held on a charge, not transported to a hearing, and then brought to court to reset the commencement date and reschedule the hearing but again not transported to that hearing.

The State argues Mr. George “could not” be transported on May 17, 2004. Brief of Respondent at 28. This argument ignores the fact Mr. George was transported for various hearings both before and after that date. The State’s argument is without merit.

The State further argues 20 days should be excluded from the computation of the time for trial, on the grounds Mr. George was in court on an unrelated charge for one day and detained on the

unrelated charges for 19 days. Brief of Respondent at 29. CrR 3.3 (e)(2) excludes “arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.” The rule excludes only time a defendant spends in court on the unrelated charge, not the time spent in custody between court appearances. The State’s argument is unsupported by the time for trial rule and should be disregarded.

The prosecutor dismissed the case on June 15, 2004, 42 days after the proper expiration date of May 4, 2004, and five days after the latest possible expiration date of June 10, 2004, in violation of the time for trial rule. Dismissal with prejudice is required. CrR 3.3(h).

3. INSUFFICIENT EVIDENCE TO ESTABLISH
THE VALIDITY OF THE CALIFORNIA
RESTRAINING ORDER REQUIRES
REVERSAL.

Several months prior to the alleged violations in the present case, a King County Superior Court commissioner ordered *any* previously entered temporary restraining orders to expire on October 23, 2004. Brief of Appellant, Appendix F at 2. Thus, as a matter of law, the California restraining order was not valid at the time of the incidents in question here.

The State argues the commissioner’s order referred only to the temporary restraining order issued by the King County Superior

Court, alleging the reference to any other temporary order³ was mere boilerplate language. Brief of Respondent at 32. The State does not cite any authority which permits a party to ignore the clear language of a court order, even when the order is a standardized form. The State's argument is without merit.

The State also argues the King County order was in violation of the federal full faith and credit statute, 18 U.S.C. 2265. Brief of Respondent at 32-33. This argument again ignores the plain language of the commissioner's order. If the State wished to contest the commissioner's authority to enter the order, it could have done so in Superior Court. This argument is also without merit.

The convictions for violation of a court order which was unsupported by sufficient evidence to establish the validity of that order must be reversed.

4. INSTRUCTIONAL ERROR REQUIRES REVERSAL OF THE CONVICTION FOR FELONY HARASSMENT.

The trial court failed to instruct the jury that the State was required to prove beyond a reasonable doubt that the victim was placed in reasonable fear the threats to kill would be carried out, an

³It may be noted that the State seems to argue the California was not a temporary restraining order, yet throughout its argument on this issue, the State refers to the "California TRO."

essential element of the crime of felony harassment as charged. CP 26, Instruction No. 7; State v. C.G., 150 Wn.2d 604, 608, 80 P.3d 594 (2003). Failure to instruct on this essential element is reversible error. State v. Mills, 154 Wn.2d 1, 109 P.3d 415, 419-422 (2005).

The State concedes the instructional error requires reversal of George's conviction for felony harassment. Brief of Respondent at 36-37. Thus, the conviction must be reversed and the charge dismissed. Alternatively, the jury verdict could be interpreted as a finding of guilty on all the elements necessary to establish the lesser included offense of gross misdemeanor harassment. In that case, the proper remedy is remand for sentencing on the gross misdemeanor. The State's proposed remedy of remand for re-trial on the charge of felony harassment is contrary to the prohibition against double jeopardy.

This Court should accept the State's concession of error, reverse Mr. George's conviction for felony harassment and either dismiss the charge or remand for sentencing for gross misdemeanor harassment.

B. CONCLUSION

Mr. George's convictions for misdemeanor violation of a court order were obtained in violation of the prohibition against double jeopardy, in violation of the time for trial rule, and were based on insufficient evidence. The conviction for felony harassment was obtained in violation of his right to due process and to trial by jury. For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. George respectfully requests this Court reverse his convictions, and dismiss all charges. Alternatively, Mr. George requests this Court reverse and dismiss the misdemeanor convictions and reverse the felony conviction and remand for sentencing on the gross misdemeanor.

DATED this 20th day of June, 2005.

Respectfully submitted,



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APPENDIX A



JIS-Link Application Screen



D0030I Beginning of Docket

DD1000PI

06/13/05 14:16:37

DD1000MI Case Docket Inquiry (CDK)

KENT MUNICIPAL COURT PUB

Case: K43924FV KNP CN Csh: Pty: DEF 1 StID:

Name: GEORGE, KEITH GREGORY NmCd: IN 011 12254

Name: GEORGE, KEITH GREGORY Cln Sts:

RESTRAINING ORDER VIOLATION

Note:

Case: K43924FV KNP CN Criminal Non-Traffic Closed

N

02 23 2004 DEF BOOKED INTO KENT CORRECTIONS ON NEW CHARGES

KDS

S 02 24 2004 Case Filed on 02/24/2004

KDS

S Charge 1 is DV-related

KDS

S DEF 1 GEORGE, KEITH GREGORY Added as Participant

KDS

S OFF 1 CLARK, T Added as Participant

KDS

S ARR NN Set for 02/24/2004 01:30 PM

KDS

S in Room I with Judge GMP

KDS

FILED: IN-CUSTODY INFORMATION FORM AND ADVISAL OF RIGHTS

KDS

S VCT 1 GEORGE, JULIANNA BARBARA Added as Participant

KDS

FILED: AMENDED COMPLAINT, MOTIONS FOR FINDING OF PROBABLE

KDS

CAUSE, NO CONTACT ORDER, CONFIDENTIALITY OF VICTIM

KDS

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DD1000MI Case Docket Inquiry (CDK)

KENT MUNICIPAL COURT PUB

Case: K43924FV_ KNP CN Csh: Pty: DEF 1 StID:

Name: GEORGE, KEITH GREGORY NmCd: IN 011 12254

Name: GEORGE, KEITH GREGORY Cln Sts: RESTRAINING ORDER VIOLATION

Note:

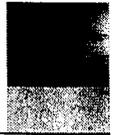
Case: K43924FV KNP CN Criminal Non-Traffic Closed N

02 24 2004 INFORMATION, FOR CONDITIONS OR WARRANT, SETTING OF BAIL, KDS
 JOINING OFFENSES AND/OR DEFANDANTS AND DEMAND FOR JURY TRIAL KDS
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 DEF PRESENT IN CUSTODY PRO SE KDS
 DEFENDANT ADVISED OF RIGHTS. KDS
 Defendant Arraigned on Charge 1 KDS
 Plea/Response of Not Guilty Entered on Charge 1 KDS
 COURT FINDS PROBABLE CAUSE KDS
 COURT SETS BAIL AT \$25,0000 CASH OR \$125,000 BONDABLE KDS
 CONDITIONS OF RELEASE UPON POSTING BAIL KDS
 -APPEAR AT ALL HEARINGS KDS
 -NO NEW LAW VIOLATIONS KDS
 -UPDATE ANY ADDRESS CHANGES KDS
 -NO CONTACT WITH VICTIM KDS

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KENT MUNICIPAL COURT PUB

Case: K43924FV KNP CN Csh: Pty: DEF 1 StID:

Name: GEORGE, KEITH GREGORY NmCd: IN 011 12254

Name: GEORGE, KEITH GREGORY Cln Sts: RESTRAINING ORDER VIOLATION

Note:

Case: K43924FV KNP CN Criminal Non-Traffic Closed

N

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				-NO ALCOHOL/DRUGS	KDS
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S				PTR NN Rescheduled to 02/26/2004 01:30 PM	KDS
S				in Room I with Judge GMP	KDS
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				DEF PRESENT IN CUSTODY WITH ATY STEWART	EMB
				DEFENSE MOVES TO CONTINUE FOR FURTHER INVESTIGATION, GRANTED	EMB

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DD1000MI Case Docket Inquiry (CDK)

KENT MUNICIPAL COURT PUB

Case: Csh: Pty: StID:

Name: NmCd:

Name: GEORGE, KEITH GREGORY Cln Sts:
RESTRAINING ORDER VIOLATION

Note:

Case: K43924FV KNP CN Criminal Non-Traffic Closed

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DD1000MI Case Docket Inquiry (CDK)

KENT MUNICIPAL COURT PUB

Case: Csh: Pty: StID:

Name: NmCd:

Name: GEORGE, KEITH GREGORY Cln Sts:

RESTRAINING ORDER VIOLATION

Note:

Case: K43924FV KNP CN Criminal Non-Traffic Closed

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			DEFENSE OBJECTS	EMB
			COURT GRANTS MOTION	EMB
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			IS 4/26/04	EMB
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S			Charge 2 is DV-related	EMB
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KENT MUNICIPAL COURT PUB

Case: Csh: Pty: StID:

Name: NmCd:

Name: GEORGE, KEITH GREGORY Cln Sts:
RESTRAINING ORDER VIOLATION

Note:

Case: K43924FV KNP CN Criminal Non-Traffic Closed

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DD1000MI Case Docket Inquiry (CDK)

KENT MUNICIPAL COURT PUB

Case: Csh: Pty: StID:

Name: NmCd:

Name: GEORGE, KEITH GREGORY Cln Sts:
RESTRAINING ORDER VIOLATION

Note:

Case: K43924FV KNP CN Criminal Non-Traffic Closed

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				COPY OF ORDER TO CITY ATY, KPD, AND DEFENSE	ARV
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				CITY MOVES TO ADD CT 5 IN K43955FV.	JLB
				DEFENSE WAIVES FORMAL READING AND ENTERS PLEA OF NOT GUILTY	JLB

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DD1000MI Case Docket Inquiry (CDK)

KENT MUNICIPAL COURT PUB

Case: Csh: Pty: StID:

Name: NmCd:

Name: GEORGE, KEITH GREGORY Cln Sts:
RESTRAINING ORDER VIOLATION

Note:

Case: K43924FV KNP CN Criminal Non-Traffic Closed

N

PARTIES AGREE TO JOIN CASES

JLB

DEFENSE OBJECTS TO ANY NEW EVIDENCE BEING ADMITTED JLB
DISCOVERY WAS INCOMPLETE AT TIME OF PRETRIAL ORDER AND CITY JLB
WAS ORDERED TO BE PROVIDED BY 3-16-04 JLB
COURT ADVISES ANY NEW EVIDENCE IS EXCLUDED JLB
DEFENSE MOTION TO SUPPRESS ANY PRIOR BAD ACTS JLB
PARTIES ADDRESS PROOF OF SERVICE JLB
PLAINTIFF'S EXHIBIT A MARKED FOR IDENTIFICATION: PROOF OF JLB
SERVICE JLB
COURT FINDS CITY HAS NOT MET ITS BURDEN FOR PROOF OF JLB
PERSONAL SERVICE JLB
COURT DISMISSES RESTRAINING ORDER VIOLATIONS WITH PREJUDICE JLB
S Charge 2 Dismissed W/Prejudice : Defense Motion JLB
S Case Heard Before Judge MCSEVENNEY, ROBERT BC JLB

Enter	PA1	PA2	Clear	Refresh	Disconnect						
PF01	PF02	PF03	PF04	PF05	PF06	PF07	PF08	PF09	PF10	PF11	PF12
PF13	PF14	PF15	PF16	PF17	PF18	PF19	PF20	PF21	PF22	PF23	PF24



JIS-Link Application Screen

D0031I End of Docket

DD1000PI

06/13/05 14:10:50

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<input type="text" value="04"/>	<input type="text" value="28"/>	<input type="text" value="2004"/>	FILED/SERVED: TERMINATION OF NO CONTACT ORDER	JLB
S			Order modified On 04/28/2004 NO CONTACT modified	JLB
S			termination date from blank to 04/28/2004	JLB
			NCO RECALLED THROUGH CHAR AT KPD RECORDS, 2:54PM	ARV
S			JTR NN: Held	JLB
			FILE CLOSED 2004	JLB
S			Case Disposition of CL Entered	JLB
	04	29	2004 FILED: RETURNED NO CONTACT ORDER FROM KPD	ARV
	05	11	2004 PHONE CALL TO KENT PD TO VERIFY THRU BARBARA THAT NCO IS	JLB
			NOT IN SYSTEM. ORIGINAL NOT RETURNED TO COURT	JLB
	06	30	2004 COPY OF TRIAL PROCEEDINGS MAILED TO THE DEFENDER ASSOCIATION	ARV
			PER THEIR REQUEST.	ARV
			PHONE CALL TO ADVISE THAT CD HAS BEEN MAILED AND THAT \$10	ARV
			TOTAL PAYMENT IS DUE FOR BOTH DAYS OF HEARINGS.	ARV

Enter	PA1	PA2	Clear	Refresh	Disconnect						
PF01	PF02	PF03	PF04	PF05	PF06	PF07	PF08	PF09	PF10	PF11	PF12
PF13	PF14	PF15	PF16	PF17	PF18	PF19	PF20	PF21	PF22	PF23	PF24

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 54805-1-1
)	
KEITH GEORGE,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 20TH DAY OF JUNE, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KING COUNTY PROSECUTOR'S OFFICE
APPELLATE DIVISION
KING COUNTY COURTHOUSE, W-554
516 THIRD AVENUE
SEATTLE, WA 98104

[X] KEITH GEORGE
C/O RONCAL
PO BOX 6262
KENT, WA 98064

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF JUNE, 2005.

x _____ 

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2005 JUN 20 PM 4:37