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NO. 64262-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ROWLAND,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

---

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A. SUMMARY OF ARGUMENT.

When a court conducts a resentencing hearing that involves its exercise of discretion over the proper and accurate sentence to impose, the original judgment is no longer final. At the new sentencing hearing, the court must comply with current laws and procedural rules, including the right to a trial by jury for an aggravating circumstance used to impose an exceptional sentence, and the right to an accurate calculation of the offender score. Here, the court improperly imposed an exceptional sentence at a resentencing hearing without affording Michael Rowland his right to a jury determination of the aggravating factor and without allowing Rowland to challenge the accuracy of his offender score.

B. ASSIGNMENTS OF ERROR.

1. The court improperly imposed an exceptional sentence at a resentencing hearing in violation of Michael Rowland's rights under the Sixth and Fourteenth Amendments and Article I, sections 3, 21, and 22 of the Washington Constitution.

2. The court impermissibly refused to consider Rowland's challenge to his offender score at the resentencing hearing.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When a case is remanded for resentencing based on an improperly calculated offender score, the prior sentence is no longer the final judgment in the case. In resentencing Rowland, the court exercised its discretion, lowered Rowland's sentence based on a newly calculated offender score, but also imposed an exceptional sentence even though governing law prohibits the court from ordering a sentence above the standard range without a jury determination of the facts essential to punishment and proof beyond a reasonable doubt. Is the State barred from seeking an exceptional sentence at a resentencing hearing when it never provided Rowland the constitutionally required notice of this essential element of the crime and when the imposition of uncharged punishment violates the right to a jury trial under the Sixth Amendment and Article I, sections 21 and 22 of the Washington Constitution?

2. If the State is permitted to seek an exceptional sentence upon remand, is that sentence invalid when Rowland was not provided his right to notice or a jury determination of facts on which the enhanced punishment rests?

3. When a party challenges the accuracy of the offender score at a resentencing hearing, the court must determine the offender score. The court may impose sentence only after finding the criminal history has been accurately calculated. The trial court refused to consider Rowland's challenge to the accuracy of his offender score even though the law had changed since his original sentence. Was the court required to consider Rowland's challenge to his offender score and must the court do so when the case is remanded for resentencing?

D. STATEMENT OF THE CASE.

In 1991, Michael Rowland was convicted of first degree murder and he received an exceptional sentence above the standard range based on the court's finding that the crime was "deliberately cruel." CP 98, 103. A number of years after his direct appeal was final, Rowland filed a personal restraint petition. CP 57. This Court accepted the State's concession that Rowland's offender score had been incorrectly calculated because his prior California conviction for burglary was not comparable to a Washington burglary, and remanded the case "for resentencing." CP 61, 72. The Court's decision remanding the case for resentencing noted that it would not presume the State would

pursue an exceptional sentence upon remand, and it also pointedly declined to decide whether the trial court would be bound by Blakely upon resentencing if the court wanted to impose another exceptional sentence. CP 70-72.

At the 2009 resentencing hearing following remand, the court heard from three members of the victim's family, the prosecution, and the defense regarding the sentence it should impose. 9/16/09RP 2-22. The court acknowledged that Rowland's offender score was now lower and it had the authority to sentence Rowland "up or down," with either more time or less. 9/16/09RP 24. The court stated its belief that Blakely<sup>1</sup> did not restrict its power to impose a sentence greater than the standard range and imposed an exceptional sentence for the same reason as it had initially, based on its factual finding of deliberate cruelty. Id. at 23-25. The court lowered Rowland's overall sentence based on the decreased offender score but imposed an exceptional sentence of an additional 180 months above the high end of the newly calculated standard range, for a total of 527 months. CP 15.<sup>2</sup>

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<sup>1</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

<sup>2</sup> Rowland's previous sentence was 541 months. CP 100.

The court also refused to consider Rowland's claim that his offender score remained incorrectly calculated because it separately counted two concurrently imposed convictions from before 1986. CP 24-26; 9/16/09RP 18, 22-23. Under former RCW 9.94A.360(6)(c), the statute in effect at the time of Rowland's offense, convictions from before 1986 that were concurrently imposed must be counted as a single point. CP 25-26. Instead of ruling on Rowland's claim, the court found he could not challenge his offender score at this resentencing hearing. 9/16/09RP 22-23. Rowland timely appeals.

E. ARGUMENT.

BECAUSE ROWLAND WAS BEING  
RESENTENCED BASED ON A NEW OFFENDER  
SCORE, THE COURT COULD NOT IGNORE  
ERRORS IN HIS OFFENDER SCORE OR IMPOSE  
AN EXCEPTIONAL SENTENCE WITHOUT  
COMPLYING WITH BLAKELY AND ITS PROGENY

The trial court disregarded precedent from this Court, the Washington Supreme Court, and the United States Supreme Court by imposing an exceptional sentence predicated on a judicial determination of the essential element authorizing exceptional punishment. The trial court concluded that Blakely and its progeny did not apply to Rowland. However, Rowland was resentenced in

2009; at the 2009 sentencing the court exercised independent judgment and had the full range of sentencing discretion; and current sentencing rules prohibited the court from imposing an exceptional sentence based on purely judicial fact-finding.

1. At a resentencing hearing at which the court exercises its discretion, the court must comply with all statutes and constitutional requirements. When a case returns to trial court for resentencing, the prior sentence is no longer the final judgment in the case. State v. McNeal, 142 Wn.App. 777, 787-88, 175 P.3d 1139 (2008); see also State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009). The only exception is when the resentencing court acts in a purely ministerial capacity and does not exercise any discretion. Kilgore, 167 Wn.2d at 37; McNeal, 142 Wn.App. at 786-87. At a resentencing hearing, the court must comply with the due process and jury trial requirements as explained in Blakely and its progeny, even if the resentencing follows an exceptional sentence that was imposed before Blakely was decided. State v. Powell, 167 Wn.2d 672, \_ P.3d \_\_, 2009 WL 4844354, \*6-8 (Dec. 17, 2009) (explaining necessity of complying with Blakely upon remand); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 21, 22; RCW 9.94A.537.

In Blakely, the Supreme Court held that punishment may only follow from facts found by a jury beyond a reasonable doubt, and invalidated Washington's exceptional sentencing scheme, which permitted courts to impose sentences greater than the standard range based on judicial factfinding. 542 U.S. at 304-05. Any fact that increases punishment, no matter how it is labeled, constitutes an element and must be proven beyond a reasonable doubt. Id. at 306-07.

Blakely has been interpreted as a procedural rule that does not retroactively nullify exceptional sentences that were final before the decision was issued. State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005). When this Court found Rowland was entitled to a new sentencing hearing, it noted that Blakely was decided after Rowland's direct appeal was final. CP 68. The Court expressed uncertainty as to whether Blakely would apply to Rowland's resentencing in the event the State again sought an exceptional sentence, but it did not rule on its application. CP 71. Several recently decided cases clarify Blakely's application to Rowland's resentencing and explain that the court was obligated to comply with the now established requirement that facts essential to punishment must be proved to a jury beyond a reasonable doubt.

In a scenario almost identical to Rowland's, the defendant in McNeal had received an exceptional sentence above the standard range in 1997, and his direct appeal was final two years before Blakely was decided. 142 Wn.App. at 781 n.1, 783. Several years later, he challenged his sentence in a personal restraint petition and the court granted relief in part, finding his sentence for one offense exceeded the statutory maximum and deferring to the trial court to consider other challenges McNeal made to his sentence. Id. at 784. At the resentencing hearing, the trial court found Blakely did not apply to McNeal because his original direct appeal was final before Blakely was decided. Id. The resentencing court recalculated McNeal's offender score as one point lower than previously found, although it did not alter the standard range because the score remained greater than nine, and imposed an exceptional sentence based on previously entered findings.

In his subsequent appeal from this resentencing, the Court of Appeals ruled that the resentencing court erred by finding it was not bound by the dictates of Blakely. Id. at 786-87. Once the case was remanded for a new sentencing hearing, the judgment was no longer final and "the trial court therefore erred when it found Blakely did not apply to McNeal's sentence on remand." Id. The court

again remanded the case, with the explanation that if the State seeks an exceptional sentence, the court must empanel a jury for a trial on the aggravating factors. Id. at 788; see also State v. Applegate, 147 Wn.App. 166, 172, 194 P.3d 1000 (2008) (adopting reasoning of McNeal and remanding for jury trial on exceptional sentence following Blakely).

Following McNeal, the Court of Appeals similarly ruled that when a trial court conducts an adversarial resentencing proceeding, it has exercised discretion and the finality of the sentence runs from the entry of that recently entered sentence. State v. Toney, 149 Wn.App. 787, 792-93, 205 P.3d 944 (2009). Like McNeal, Toney involved a sentence originally entered in 1996, which was later overturned and Toney was resentenced. The State argued in Toney that the resentencing was purely ministerial and Toney could not raise new challenges to his sentence in the appeal that followed his resentencing. Id. at 791. The Court of Appeals relied on McNeal for the principle that when the court has an adversarial resentencing hearing, that subsequently-entered sentence serves as the final judgment from which an appeal may be taken. Id. at 793.

McNeal and Toney both cited the Court of Appeals ruling in Kilgore, which was subsequently affirmed by the Supreme Court. Toney, 149 Wn.App. at 793; McNeal, 142 Wn.App. 787 n.13 (citing State v. Kilgore, 141 Wn.App. 817, 172 P.3d 373 (2007)). The Supreme Court held in Kilgore that when a court exercises any discretion in a resentencing hearing, the finality of the sentence runs from the entry of the new sentence. 167 Wn.2d at 41. In Kilgore, the defendant originally received an exceptional sentence for five separate counts, and after two of those counts were reversed on appeal, the State elected not to re-prosecute the overturned charges. Id. at 33. In response to the vacated convictions, the trial court simply amended the Judgment and Sentence to excise the overturned counts. Id. at 34. The original sentence consisted of identical concurrent exceptional sentences imposed for all offenses, so the amended sentence did not alter the amount of incarceration actually imposed.

The Kilgore Court ruled that when there is an error in a defendant's offender score affecting the applicable standard range "resentencing is required." 167 Wn.2d at 41. At such a resentencing, the court has discretion to revisit issues or consider new issues if properly raised. Id. It is only when the court does not

exercise any discretion, and the amended sentence does not give rise to any appealable issues, that the finality of the decision runs from the entry of the original sentence and conclusion of direct appeal. Id. at 42-43.

Rowland's case was "remanded for resentencing." CP 68, 72 (COA 59683-3-I, Slip op. at 12, 16). The resentencing was based on an incorrect offender score. CP 66 ("The offender score listed in Rowland's 1991 judgment and sentence is incorrect."). At the resentencing hearing, the superior court judge heard arguments, noted "I can sentence you up or down," and exercised discretion by imposing a lower sentence due to the change in Rowland's offender score. CP 15; 9/16/09RP 24.

Where a court exercises discretion at a resentencing hearing, it must comply with current sentencing laws because the new sentence serves as a new final judgment. Kilgore, 167 Wn.2d at 41; McNeal, 147 Wn.App. at 786-87. As the court said in McNeal, "once we vacated McNeal's original sentence, there was no longer a final sentence, the case was no longer final, and the trial court, therefore, erred when it found that Blakely did not apply to McNeal's resentencing on remand." McNeal, 147 Wn.App. at 786-87.

The court altered Rowland's sentence based on the lower offender score but imposed an exceptional sentence based on the court's previous finding of "deliberate cruelty." 9/16/09RP 24; CP 14, 17. The court's determination that Blakely, or the sentencing statutes enacted after Blakely did not apply to Rowland was incorrect and requires resentencing. McNeal, 142 Wn.App. at 787.

2. The State may not seek an exceptional sentence upon remand because it did not provide Rowland with the required notice before trial.

a. Notice is an essential requirement for all essential elements charged in a case. The recent decision of the Supreme Court in Powell requires the State to provide formal notice of its intent to seek an exceptional sentence and that intent must be pled in the Information. 2009 WL 4844354.

Powell was a divided opinion, with the justices splitting 4-2-3, and therefore the rule of law garnering majority support was not the lead opinion for all aspects of the case. While the lead opinion found the prosecution is not required to plead the aggravating factors in the information, Powell, 2009 WL 4844354, \*4-5, that view won the support of only four justices. The remaining five justices, those who joined the concurring and dissenting opinions,

concluded the aggravating factor must be included in the information. Powell, \*8-9 (Stephens, J. concurring); Powell, \*10 (Owens, J. dissenting).<sup>3</sup> Justice Charles Johnson joined the concurring opinion, while Justice Chambers and Sanders joined the dissenting opinion.

Powell makes clear that formal notice is required before the State may seek an exceptional sentence. Powell, 8-9 (Stephens, J. concurring); Powell, at 10 (Owens, J. dissenting). That conclusion is wholly consistent with the essential elements rule addressed in State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008); U.S. Const. amends. 6, 14; Wash. Const. art. I, § 22. The essential elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. Id. at 434 (citing State v. Leach, 113 Wn.2d 678, 689, 782 P.2d 552 (1989)). The jury must find “all the facts” which are “essential to the punishment,” and therefore, aggravating factual circumstances are elements of a crime. Blakely, 542 U.S. at 304.

Likewise, RCW 9.94A.537(1) requires notice of the aggravating circumstance “upon which the requested sentence will be based.” Although the lead Powell opinion interpreted this

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<sup>3</sup> Justice Charles Johnson joined the concurring opinion, while

statutory requirement as permissive, a majority of the Supreme Court disagreed. Rowland is entitled to such notice.

b. The lack of notice and a jury finding requires remand for resentencing without the uncharged aggravated punishment. The three dissenting justices in Powell persuasively explained that the right to notice of all essential elements requires such notice be given before trial, not afterward. Powell, 2009 WL 4844354, \*10. Although this Court is bound by the majority opinions in Powell, Rowland respectfully asks this Court to apply the analysis used by the dissenting justices, relying on state and federal precedent, that notice of all elements must be “set forth in the information” and “given at some point prior to the opening statements.” Id. at \*11-12 (quoting Recuenco, 163 Wn.2d at 440-41; citing Blakely, 542 U.S. at 303; U.S. Const. amend. 6; Wash. Const. art. I, § 22).

Furthermore, in Recuenco, the Supreme Court ruled that the remedy for a lack of notice of an essential element increasing punishment is to strike the punishment emanating from the uncharged aggravating circumstance. Where the State fails to provide notice of enhancements or aggravating factors, the proper

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Justice Chambers and Sanders joined the dissenting opinion.

remedy is to remand for entry of a standard range sentence.

Recuenco 163 Wn.2d at 442; see also State v. Williams-Walker, \_\_ Wn.2d \_\_, 2010 WL 118211, \*5 (Jan. 14, 2010) (finding that remedy required by Art. I, § 21 for court's imposition of punishment not authorized by jury verdict is dismissal of aggravating punishment).

Importantly, Recuenco and Williams-Walker did not remand the case to afford the State the opportunity to amend the Information and retry the case. Similarly, the remedy in this case is to remand the matter for imposition of the standard range sentence supported by the facts which the State alleged in the information and the jury's verdict.

3. Alternatively, an exceptional sentence may not be imposed unless the State proves the elements essential to the aggravated punishment to a unanimous jury beyond a reasonable doubt. Under RCW 9.94A.537(2):

*In any case* where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(emphasis added.). The facts supporting an aggravating circumstance must be proved to a unanimous jury beyond a

reasonable doubt. RCW 9.94A.537(3). These statutory mandates were created in an effort to comply with the constitutional requirements of Blakely and apply to any case when resentencing occurs following case where there was a previously imposed exceptional sentence. McNeal, 142 Wn.App. 790-91 (citing State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007); accord Powell, 2009 WL 4844354, \*8.

The trial court's belief that Blakely did not apply to Rowland's resentencing may have stemmed from *dicta* in this Court's decision remanding the case. After holding that Rowland was entitled to resentencing, the decision further discussed possible resentencing scenarios. CP 68-71. Without ruling on the matter, the court "questioned the assumption" of both the prosecution and defense attorneys that Blakely would apply at resentencing. CP 71. This aspect of the Court's opinion was not binding authority, as the decision also said it would be "premature to dictate any particular procedure the trial court must use" at resentencing and it would not presume the State would seek an exceptional sentence upon remand. CP 71; see State v. Fontaga, 148 Wn.2d 350, 364, 60 P.3d 1192 (2003) (when court goes "beyond what is necessary to decide case," resulting discussion is not mandatory authority).

The trial court did not interpret this aspect of the Court of Appeals decision as binding authority, referring to it as a “comment” from the Court of Appeals indicating that it could affirm the exceptional sentence. 9/16/09RP 23. The court then ruled that it believed Blakely should not apply and it believed an exceptional sentence was warranted. Id.

The *dicta* discussion of the resentencing court’s authority on remand does not address McNeal, Kilgore, or In re Skylstad, 160 Wn.2d 944, 949, 162 P.3d 413 (2007). CP 71-72. Skylstad held that a judgment is not final when the sentence is vacated and resentencing occurs; rather, it is the finally imposed sentence that dictates the finality of the judgment. Under these authorities, as well as the case law discussed above, the resentencing hearing at which the court reconsidered and altered Rowland’s sentence constitutes a newly imposed sentence and must comply with the right to have a jury decide the elements essential to enhanced punishment under RCW 9.94A.535; RCW 9.94A.537, and case law interpreting these statutes.

4. At the resentencing hearing, the court must consider Rowland’s challenges to his offender score. The prosecution argued at the resentencing hearing that Rowland could not contest

his offender score because he had not done so in his PRP and therefore his offender score was “law of the case.” 9/16/09RP 2. Without explicitly finding Rowland could not challenge his offender score, the court ruled that Rowland’s offender score “comes back to me with the posture that the score is a 2.” 9/16/09RP 23. These two points were based on two California drug offenses from the early 1980s.<sup>4</sup> The court refused to consider Rowland’s claim that his offender score improperly counted two California convictions for heroin sale and possession as a single point. CP 24-26; 9/16/09RP 18.

RCW 9.94A.530(2) provides,

On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

Rowland’s case was “remanded for resentencing,” and he is entitled to present and argue that his criminal history has not been accurately calculated. At Rowland’s original sentencing hearing, the prosecution explained these two California drug convictions had initially been imposed concurrently, but later probation was revoked

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<sup>4</sup> The sentencing court ruled that Rowland’s convictions for first degree murder and taking a motor vehicle were the same criminal conduct and must count as a single point in his offender score.

and sentences imposed separately, and thus, it argued they should be treated as consecutive sentences. CP 25-26; 3/12/1991RP 5.<sup>5</sup> Rowland did not agree to the State's calculation of his offender score or challenge the inclusion of these two convictions in his earlier appeal. 3/12/1991RP 6-7.

The prosecution's argument for treating the two offenses separately in calculating Rowland's offender score is directly contrary to Matter of Seitz, 124 Wn.2d 645, 880 P.2d 34 (1994). In Seitz, the court recognized that under former RCW 9.94A.360(6)(c), multiple prior convictions committed before 1986 counted as a single point when they were served concurrently.<sup>6</sup> The scoring sheet the State provided for the court to calculate Rowland's standard range at his resentencing contains this very language, demonstrating its uncontested application to the case at bar. CP 21.

In Seitz, the court addressed whether deferred or suspended sentences that were later revoked should be treated as

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<sup>5</sup> The sentencing transcript from the original sentencing hearing was included in Rowland's personal restraint petition and a motion to transfer that volume of proceedings has been filed with this brief in the event it is helpful to the issues raised in the case at bar.

<sup>6</sup> Former RCW 9.94A.360(6)(c) provides in pertinent part, "In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense . . ."

“concurrently served” convictions when they were imposed concurrently but were ultimately served separately based on a revocation of probation. 124 Wn.2d at 648. After analyzing the statutory language and finding it ambiguous, the court ruled that it must abide by the rule of lenity and interpret “concurrently served” convictions under former RCW 9.94A.360(3)(c) as convictions that were imposed concurrently even if later circumstances result in additional time being served separately. *Id.* at 651-52. The court ruled that all adult sentences imposed concurrently before 1986 but separately sentenced due to the revocation of probation, will “count as one offense for purposes of calculating a defendant's offender score under the SRA.” *Id.* at 652.

In Matter of Johnson, 131 Wn.2d 558, 567, 933 P.2d 1019 (1997), the court ruled that Seitz represented a “material change in the law” and provided good cause for a defendant to raise a new petition for relief. Seitz overruled a prior contrary interpretation of the calculation of concurrently imposed and revoked sentences in State v. Chavez, 52 Wn.App. 796, 764 P.2d 659 (1988). Seitz, 124 Wn.2d at 650. In Johnson, the court concluded that counting two concurrently imposed but later revoked sentences as two points contrary to Seitz amounted to a “fundamental defect in his

sentence that results in a miscarriage of justice.” Id. at 568. The court granted relief even though Johnson’s petition was improperly successive and he had not raised the issue in his direct appeal.

Rowland’s offender score was not accurately calculated. His prior California offenses were imposed concurrently, before 1986, and resulted in separate sentences only after probation was revoked. 3/12/1991RP 5; CP 25-26. Since Rowland’s original sentence, there has been a material change in the law. Because the court is required to impose a new sentence based on an accurate calculation of the offender score, the court improperly refused to consider Rowland’s challenge to his offender score. Under the pertinent binding interpretation of the controlling sentencing statute, the court must consider this challenge during his resentencing hearing.

F. CONCLUSION.

For the reasons stated above, Mr. Rowland respectfully asks this Court to reverse his sentence and remand this case for a new sentencing.

DATED this 25<sup>th</sup> day of February 2010.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 64262-6-I
	)	
	)	
MICHAEL ROWLAND,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 25<sup>TH</sup> DAY OF FEBRUARY, 2010.

X \_\_\_\_\_ 

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