

NO. 62251-0-I

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

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

ROOSEVELT YOUNG, JR.,

Appellant.

REC'D
MAY 27 2009
King County Prosecutor
Appellate Unit

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

The Honorable Monica Benton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting testimonial hearsay in violation of appellant's confrontation rights.

2. The court erred when it sentenced appellant to an impermissible indeterminate sentence in violation of the Sentencing Reform Act (SRA) and the constitutional separation of powers doctrine.¹

Issues Pertaining to Assignments of Error

1. Did the trial court violate appellant's constitutional right to confront the witnesses against him when it admitted testimonial hearsay that undermined appellant's defense?

2. On an offense with a statutory maximum of 60 months, appellant was sentenced to 48 months of incarceration and nine to 18 months of community custody. Under State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008), however, courts that impose a combined term of incarceration and community custody that exceeds the statutory maximum must enter a determinate sentence specifying — based on an exercise of the court's discretion — what period is to be served in incarceration and what period is to be served in community custody.

¹ The Supreme Court will hear oral argument on this issue in In re Brooks, No. 80704-3 on May 28, 2009. This Court should, in the mean time, follow its decision in State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008) and grant Young the relief he seeks.

Should this Court therefore remand for entry of a determinate sentence consistent with Linerud and the SRA?

3. The constitutional separation of powers doctrine prohibits one branch of government from improperly ceding its duties to another. The Washington legislature established the appropriate sentences for crimes and, with certain exceptions that do not apply here, required sentencing courts to impose determinate sentences within the framework of the SRA and within the statutory maximum sentences for each offense. The Department of Corrections (DOC) is authorized only to enforce the sentence imposed. Where a sentencing court imposes a sentence in which the total terms of confinement and community custody exceed the statutory maximum and does not specify which should be reduced to fit within the statutory maximum sentence, has the trial court improperly ceded its sentencing obligation to the executive branch?²

² In Linerud, this Court held the sentence violated the plain language of the SRA and therefore did not reach a separation of powers argument. Nonetheless, remand is also required in this case because Young's sentence violates the separation of powers doctrine.

B. STATEMENT OF THE CASE³

1. Procedural Facts

The King County prosecutor charged appellant Roosevelt Young, Jr. with violation of no-contact order based on a March 22, 2008 incident involving Simone Liberty. The charge was elevated to a class C felony based on the allegation that Young assaulted Liberty. CP 1-5; RCW 26.50.110(1), (4).

A jury found Young guilty as charged, and the court sentenced him within the standard range to 48 months of incarceration plus nine to 18 months of community custody. CP 17-18, 49-50.

2. Trial Testimony

Jordana Lesesne heard a woman screaming “don’t hit me, stop” from Rainier Playfield, a park near her house. 4RP 7-9. As she neared the park, Lesesne saw a man and a woman by a park bench. 4RP 10-11, 16. The woman screamed, “[S]top hitting me” and the man pushed her onto the bench. 4RP 11. Lesesne tried to call 911, but her phone was not working. 4RP 16. As Lesesne conferred with people waiting at a bus stop on South 37th Street, two men (including the man she had just seen) and the woman walked northbound past Lesesne. 4RP 15-16.

³ This brief refers to the verbatim report of proceedings as follows: 1RP – 5/20/08; 2RP – 7/24/08; 3RP – 7/28/08; 4RP – 7/29/08; 5RP – 7/30/08; and 6RP – 8/22/08.

Lesesne identified Young during trial as the man who pushed the woman. 4RP 16. Lesesne was, however, unable to describe the man's clothing other than that he was wearing a top that was lighter than his pants. 4RP 16-17, 23.

Over hearsay and confrontation objections, the State introduced three 911 calls from two callers who did not testify. 3RP 52-64; 4RP 6-7; Ex. 1; CP 7-16 (transcripts of Ex. 1). The first caller, who identified herself as Danielle White, informed the dispatcher that a black man dressed in a black beanie, blue coat, and red hooded sweatshirt was punching and dragging a woman by her hair. CP 7-12. White estimated the man was 50 years old and the woman, who was wearing a red hooded sweatshirt, was 40. CP 9-11. Another man wearing tan stood nearby, but he was not involved in the altercation. CP 9.

White believed the woman was injured in the fight. CP 9. She later updated the dispatcher that the parties, who were still fighting, had left Rainier Playfield and were moving northbound on 37th. CP 16.

A second, anonymous, caller reported a black man was hitting and pulling a white woman in a red jacket. CP 13-15. The caller could not estimate the man's age but reported he wore a black knit hat and a black jacket over a red sweater. CP 14-15. The caller reported the fight started at 37th and Oregon Street but moved north on 37th. CP 13-14.

Officer Bradley Krise was dispatched to the area. 4RP 28. As Krise turned north onto 37th Avenue just south of Genesee Street, a bystander flagged him down and pointed to two black men standing on the west side of 37th. 4RP 29. The court overruled Young's objections on hearsay and confrontation grounds. 4RP 29.

The prosecutor asked Krise, "Were you able to determine which of the two was the suspect that you were looking for?" 4RP 29. Krise "confirmed [it] with the person who flagged me down." 4RP 30. Defense counsel again objected on hearsay and confrontation grounds. 4RP 30. The court sustained the objection and ordered the prosecutor to rephrase the question. 4RP 30.

The prosecutor asked, "Did that witness identify to you the individual that was involved?" After the court overruled hearsay and confrontation objections, Krise answered, "Yes." 4RP 30. It was the man wearing "the beanie hat, the red hooded sweatshirt under the jacket with the blue jeans." 4RP 30. Krise identified Young as the man the witness pointed out. 4RP 30-31.

Officer Nicholas Carter saw a woman in a red hooded sweatshirt walking near the corner of 37th and Oregon, about 20-25 feet ahead of two black men. 4RP 41-42, 46, 50. Carter caught up with the woman, Liberty, at the nearby Shell station and noticed her left cheek was red and swollen

and there were dirty skid marks on the knee areas of her pants. 4RP 44-46. Liberty's hair, however, did not appear disheveled. 4RP 44. Carter believed Liberty's facial injury was recent because it had not yet darkened into a bruise. 4RP 46. Liberty appeared somewhat intoxicated and covered her face when Carter tried to take photos. 4RP 48-49.

Liberty testified she dated Young dated for four years. 5RP 17. A no-contact order forbid Young from contacting her, although she wanted the order lifted. 4RP 51-53; 5RP 25; Ex. 5.

The morning of the incident, Liberty took the bus from downtown Seattle to retrieve some personal items from Young's mother's house near the park. 5RP 17-19. Liberty ran into Young and a man she knew as "Lindsey" in the park. 5RP 19-20. Liberty and Young argued, and even though Liberty may have hit Young, Young did not strike Liberty. 5RP 21, 25-27. Liberty received the mark on her face in a fight with a woman two weeks earlier. 5RP 23-24.

Officer Clark Dickson was dispatched to the area and sat in his patrol car waiting for backup to arrive. 5RP 5. He watched a woman and two men walk north on 37th. 5RP 5-6. The woman and one of the men were involved in a heated discussion, but Dickson saw no physical contact. 5RP 6-7, 15. Once backup arrived, Dickson approached the group. 5RP 8. The woman walked away and other officer approached

her. 5RP 8. Young was arrested after police learned of the no-contact order. 5RP 10-11.

3. Discussion Regarding Sidebar

Outside the jury's hearing, the court discussed a sidebar that defense counsel requested before Officer Krise testified. 4RP 58. According to the court, counsel gave notice he would object to Krise's testimony that an unknown witness pointed out Young as the assailant. 4RP 58.

Reflecting on the sidebar and Krise's testimony, the Court stated, "I've got concerns. I looked at it after my ruling [overruling the objections], and so I ask that [the State] brief the issue. Be prepared to argue tomorrow morning. Otherwise, I'm going to strike [the testimony]." 4RP 59. The matter was not raised the following day and the court did not strike the testimony. 5RP 2-50.

C. ARGUMENT

1. THE COURT VIOLATED YOUNG'S RIGHT TO CONFRONT WITNESSES WHEN IT ADMITTED THE DAMAGING HEARSAY TESTIMONY OF AN UNIDENTIFIED BYSTANDER.

The trial court violated Young's constitutional right to confront witnesses when it admitted the testimonial hearsay statements of an unidentified bystander through a police officer's testimony. Because the

erroneous admission of the evidence was not harmless beyond a reasonable doubt, reversal is required.

a. The State and Federal Constitutions Protect the Right of the Accused to Confront Witnesses.

An accused person has both state and federal constitutional rights to confront witnesses. Article I, section 22 guarantees an “accused shall have the right . . . to meet the witnesses against him face to face.” Wash. Const. art. I, § 22 (Amend. 10); State v. Shafer, 156 Wn.2d 381, 395, 128 P.3d 87, cert. denied, 75 U.S. 3247 (2006). Likewise, the Sixth Amendment protects the right of the accused to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The essence of the right to confrontation is the right to meaningfully cross-examination one's accusers. Id. at 50, 59. Consequently, unless the speaker is unavailable and the accused had an earlier opportunity to cross-examine, hearsay evidence of a testimonial statement is inadmissible. Id. at 68. This Court reviews alleged confrontation clause violations de novo. State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

"Hearsay" is any out-of-court statement offered as "evidence to prove the truth of the matter asserted." ER 801(c); ER 802; State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991). A "statement" includes nonverbal conduct intended as an assertion. ER 801(a)(2).

The "core class" of testimonial statements includes those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52.

In Davis, the Court elaborated on what did and did not constitute "testimonial" statements. "Non-testimonial" statements may occur in the course of police interrogation when, objectively viewed, "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 822. In contrast, statements are "testimonial" when, objectively viewed, "there is no such ongoing emergency [and] the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id., 547 U.S. at 822; accord, State v. Ohlson, 162 Wn.2d 1, 11-12, 168 P.3d 1273 (2007).

Generally speaking, a police officer's testimony may not incorporate the out-of-court statements by an informant or dispatcher. Johnson, 61 Wn. App. at 549; State v. Aaron, 57 Wn. App. 277, 280, 787

P.2d 949 (1990). A police officer may describe the context and background of a criminal investigation, but such explanation must not include out-of-court statements. State v. O'Hara, 141 Wn. App. 900, 910, 174 P.3d 114 (2007), review granted in part, 164 Wn.2d 1002 (2008).

b. The Officer's Testimony Recounting The Testimonial Statements Of An Unidentified Witness That Young Had No Opportunity To Cross-Examine Violated Young's Right To Confront Witnesses.

Officer Krise's testimony about the non-testifying, unidentified bystander's assertive conduct and/or statements indicating Young was the assailant violated Young's right to confront of witnesses. The statements were hearsay and, under the test set forth in Davis, they were testimonial.

To determine whether statements elicited through police questioning trigger the confrontation clause, the question is "whether, objectively considered, the interrogation that took place . . . produced testimonial statements." Davis, 547 U.S. at 826. Under the "primary purpose" test, courts must objectively appraise the interrogation to determine whether its primary purpose is to enable police to meet an ongoing emergency. Id. at 822.

In applying the test to the cases of two defendants, Davis and Hammon, the Davis Court discussed four pertinent factors to be considered in making such a determination: (1) the timing relative to the

events discussed; (2) the threat of harm posed by the situation; (3) the need for information to resolve a present emergency; and (4) the formality of the interrogation. Id. at 827-30; Ohlson, 162 Wn.2d at 12.

In Davis's case, the Court determined a caller's statements to a 911 operator during a domestic disturbance, including the caller's identification of her assailant by name in response to the operator's questions, were not "testimonial." First, the caller was speaking about events as they occurred. Second, a reasonable listener would have concluded the caller faced an immediate physical threat. Third, objectively viewed, the elicited statements were necessary to resolve the present emergency, rather than simply to learn (as in Crawford) what happened in the past. Finally, as to the level of formality, unlike the declarant in Crawford, the caller provided answers in a "frantic" environment. The Davis Court concluded "the circumstances of [the] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency," rendering the resulting statements non-testimonial. Davis, 547 U.S. at 827-28.

With respect to Hammon's case, however, the Davis court held a woman's statements to a police officer who responded to a domestic disturbance call were testimonial. "When the officer questioned [the woman], and elicited the challenged statements, he was not seeking to

determine . . . ‘what is happening,’ but rather ‘what happened.’” Id. at 830. Second, there was no emergency in progress. Id. at 829. Finally, while “the Crawford interrogation was more formal,” the present interrogation was “formal enough.” Id. at 830. The Davis Court concluded, “It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct,” rendering the resulting statements testimonial. Id. at 829.

While the police questioning in the present case cannot be characterized as “formal,” it was, in the words of the Davis Court, “formal enough.” Id. at 830. More significant to this Court’s analysis, however, is the fact the parties had stopped fighting and had separated by the time Krise arrived. 4RP 29-30, 42; 5RP 5-7. The bystander who identified Young as Liberty’s assailant referred to activity occurring in the past. Davis, 847 U.S. at 829-30. There was thus no present emergency or threat of harm. Id.

Based on the pertinent Davis factors, the bystander’s out-of- court statements were testimonial and prohibited by the confrontation clause.

c. The Trial Court’s Constitutional Error Was Not Harmless Beyond A Reasonable Doubt.

Confrontation clause errors are subject to harmless error analysis. Shafer, 156 Wn.2d at 395. A constitutional error is harmless only if the

appellate court is convinced beyond a reasonable doubt that a reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is presumed prejudicial and the State bears the burden of proving the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

The State cannot meet its burden to demonstrate beyond a reasonable doubt the jury would have reached the same result absent the tainted evidence. Aside from the 911 callers, who did not testify, only one other witness, Lesesne, identified Young rather than “Lindsey” as the man who assaulted Liberty. 4RP 16-17. Lesesne, however, was unable to recall anything about Young’s clothing other than that his top was lighter than his pants. 4RP 23.

The State, therefore, cannot show the jury would have reached the same result absent the error. Because there error was not harmless, reversal and remand for a new trial is the proper remedy.

2. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY BY IMPOSING A SENTENCE GREATER THAN THE STATUTORY MAXIMUM.

The jury convicted Young of a class C felony. He therefore faced a maximum sentence of 60 months. But the trial court sentenced him to a combined term of up to 66 months. CP 49-50; RCW 26.50.110(1), (4);

RCW 9A.20.021(1)(c). This Court should therefore remand so the court may impose a statutorily mandated sentence.

- a. Under The SRA, A Sentencing Court Must Impose A Determinate Sentence That Does Not Exceed The Statutory Maximum.

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A trial court may not impose a sentence in which the total time of confinement and supervision served exceeds the statutory maximum. RCW 9.94A.505(5). A judgment and sentence that violates RCW 9.94A.505(5) is facially invalid. Linerud, 147 Wn. App. at 950 (citing State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005)).

In addition, with a few exceptions inapplicable here, the SRA requires courts to impose only determinate sentences, *i.e.*, “sentence[s] that state[] with exactitude the number of actual years, months, or days of total confinement, of partial confinement, [or] of community supervision.” Former RCW 9.94A.030(18) (2006). The DOC is, nonetheless, permitted to reduce the actual period of confinement through earned release. Former RCW 9.94A.030(18).

This Court recently held a previous approach to remedying sentences exceeding the statutory maximum violated the SRA’s requirement that such sentences be “determinate.”

Linerud was sentenced to a standard range term of 43 months followed by a 36-48 month period of community custody even though the statutory maximum sentence was, as here, 60 months. Linerud, 147 Wn. App. at 947. Consistent with prior case law, Linerud's judgment and sentence included a handwritten notation limiting the combined prison time and community custody to the statutory maximum of 60 months. Id. Linerud appealed, arguing in part that his sentence was indeterminate in violation of the SRA. Id.

This Court agreed and rejected the prior approach to dealing with such sentences under State v. Sloan, 121 Wn. App. 220, 87 P.3d 1214 (2004). Linerud, 147 Wn. App. at 948-50. Sloan required remand for a statement in the judgment and sentence limiting the combined terms of incarceration and community custody to the statutory maximum. Linerud, 147 Wn. App. at 948 (citing Sloan, 121 Wn. App. at 223-24).⁴

The Sloan approach was approved in State v. Davis, 146 Wn. App. 714, 192 P.3d 29 (2008). The Davis Court was not, however, asked to address the claims Linerud raised. Linerud, 147 Wn. App. at 949. This

⁴ In contrast, this Court approved of the alternative approach set forth in State v. Hudnall, 116 Wn. App. 190, 64 P.3d 687 (2003), which holds that a sentencing court has discretion to impose a shorter period of community custody than mandated within the SRA to stay within the statutory maximum. Linerud, 147 Wn.2d at 948.

Court therefore rejected Sloan in favor of remand for entry of a determinate sentence, *i.e.*, one specifying “how much of that sentence is confinement and how much is community custody.” Linerud, 147 Wn. App. at 951; *see also* State v. Berg, 147 Wn. App. 923, 941, 198 P.3d 529 (2008) (“[W]e abandoned the Sloan approach based on the defendant's argument that it leads to an indeterminate sentence.”).

This Court concluded, “Whatever authority the DOC may have to grant or deny good time credits or release an inmate from community custody, the courts have a duty under RCW 9.94A.505(5) and [former] RCW 9.94A.030(18) to *impose* a determinate sentence within the standard range.” Linerud, 147 Wn. App. at 950.

In other words, where the total term of confinement and community custody exceeds the statutory maximum, the trial court has three options: decrease the term of confinement, decrease the community custody range, or do some combination of the two. *See* Linerud, 147 Wn. App. at 950 n.17 (RCW 9.94A.715(1) provides sentencing court must choose between imposing the community custody range set forth in RCW 9.94A.850 or the period of earned early release); Davis, 146 Wn. App. at 717 (approving of shortened community custody and incarceration periods to fit sentence within statutory maximum); State v. Hudnall, 116 Wn. App.

190, 192-93, 64 P.3d 687 (2003) (approving shortened community custody period).

b. Young's Sentence is Indeterminate In Violation Of The SRA.

The trial court sentenced Young to 48 months incarceration plus nine months to 18 months of community custody. This sentence is invalid because the combined term of 66 months exceeds the 60-month statutory maximum and it is unclear whether the sentence requires the period of incarceration or the period of community custody to be reduced. Young's sentence is thus facially invalid. This Court should remand for entry of a determinate sentence based on an exercise of the sentencing court's discretion to determine what portion of Young's sentence should be confinement and what portion be community custody. Linerud, 147 Wn. App. at 951.

3. YOUNG'S INVALID SENTENCE ALSO VIOLATES THE SEPARATION OF POWERS DOCTRINE.

The combined terms of incarceration and community custody exceed the statutory maximum sentence, leaving it to the DOC to decide which to reduce and thus to set the actual term of Young's sentence. The trial court therefore improperly ceded its sentencing obligation to the executive branch in violation of the separation of powers doctrine, and remand is required.

The separation of powers doctrine is derived from the constitution's distribution of governmental authority into three branches. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Each branch may exercise only the powers it is given, and one branch is not permitted to encroach upon the fundamental function of another or delegate its authority to another branch. Id.; State v. Ermert, 94 Wn. 2d 839, 847, 621 P.2d 121 (1980).

Like the federal constitution, Washington's constitution does not contain a formal separation of powers clause. Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). Instead, the state constitution's division of political power among the people, legislature, executive, and judiciary has been presumed to embody vital constitutional separation of powers principles. In re Juvenile Director, 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976); Const. art. I, § 1; Const. art. II, § 1; Const. art. III, § 2; Const. art. IV, § 1.

“The fixing of legal punishments for criminal offenses is a legislative function.” State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986). The SRA reflects the legislature's intent to delegate sentencing authority to the judicial branch within the limits established therein. Id. at 181. The separation of powers doctrine precludes the judiciary or executive branches from asserting sentencing powers not

expressly granted by the legislature. Id. at 180; see State v. Monday, 85 Wn.2d 906, 909-10, 540 p.2d 416 (1975) (legislature, not judiciary, has power to alter sentencing process).

Nothing in the SRA suggests the legislature intended for sentencing courts to cede their sentencing authority to the DOC. The DOC's duty is to enforce the sentence imposed. In re Personal Restraint of Chapman, 105 Wn.2d 211, 216, 713 P.2d 106 (1986). That the DOC may or may not find an inmate qualifies for earned early release does not alleviate the sentencing court's obligation to impose a determinate sentence that complies with RCW 9.94A.505(5). Absent a delegation of authority to the DOC to set the term of the sentence, the DOC may not presume it has such power. In re Chatman, 59 Wn. App. 258, 796 P.2d 755 (1990).

Because the combined terms of incarceration and community custody exceed the statutory maximum sentence, leaving it to the DOC to decide which to reduce and thus to set the actual term of Young sentence, the trial court violated the separation of powers doctrine.

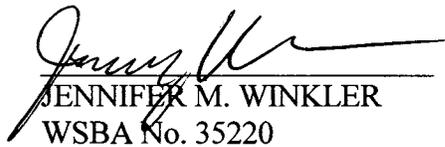
D. CONCLUSION

This Court should reverse Young's conviction because the testimonial hearsay introduced through the police officer's testimony violated Young's right to confront witnesses. This Court should also remand for resentencing so the court may exercise its discretion consistent with Linerud and the separation of powers doctrine.

DATED this 29TH day of May, 2009.

Respectfully submitted,

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
ROOSEVELT YOUNG,)
)
 Appellant.)

COA NO. 62251-0-1

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2009 MAY 27 PM 3:58

DECLARATION OF SERVICE

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

THAT ON THE 27TH DAY OF MAY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROOSEVELT YOUNG
DOC NO. 986774
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326-0769

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MAY, 2009.

x Patrick Mayovsky