06-35644

UNITED STATES COURTS OF APPEALS

FOR THE NINTH CIRCUIT

MAJOR MARGARET WITT
Appellant,

v.

UNITED STATES DEPARTMENT OF THE AIR FORCE; DONALD RUMSFELD Secretary of Defense; MICHAEL W. WYNNE, Secretary of the Department of the Air Force; and COLONEL MARY L. WALKER, Commander,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NO. C06-5195 RBL, HONORABLE RONALD B. LEIGHTON

BRIEF OF AMICI CURIAE INTERNATIONAL COMMISSION OF JURISTS AND THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL (FILED WITH CONSENT OF BOTH PARTIES)

Gwynne L. Skinner, Visiting Clinical Professor of Law
Matt D. Midles, Law Student
SEATTLE UNIVERSITY SCHOOL OF LAW
RONALD A. PETERSON LAW CLINIC
1112 E. Columbia
Seattle, WA 98122-4340
Tel: (206) 398-4130
Fax: (206) 398-4136

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Statement of Consent

All parties have consented to the filing of this Amicus Brief pursuant to Federal Rule of Appellate Procedure 29(a).

Statement of Interest

Amici curiae respectfully submit this brief as organizations dedicated to the advancement of human rights. The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. The CCR was founded by attorneys representing civil rights clients, and over the years has played an important role in many important movements for social justice. The International Commission of Jurists (ICJ) is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. The ICJ provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles.

Issue Presented

Whether 10 U.S.C. § 654[1] of the Uniform Code of Military Justice should be held as void under principles of international law adopted by the United States Supreme Court and the European Court of Human Rights.

Summary of Argument

10 U.S.C. § 654, applied generally and also specifically to this case, violates the right to privacy recognized in international law, which the U.S. Supreme Court acknowledged in its decision in *Lawrence v. Texas*. 539 U.S. 558, 573 (2003). Relying on this internationally recognized right to privacy, the European Court of Human Rights in *Lustig-Prean and Beckett v. United Kingdom,* 29 Eur. Ct. H.R. 548 (1999) struck down a similar British military provision, and amici argue that the court here should do the same. In the United States and abroad, the legal trend is toward equal privacy rights for homosexual civilians.[2] Internationally, the recognition of equal privacy rights for homosexuals has progressed from the prohibition on criminalizing private sexual conduct to recognition of homosexuals' claims to equality in non-criminal settings, including membership in the armed

[1] 10 U.S.C. § 654 is more commonly known as "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" and prohibits openly lesbian, gay, bisexual, and transgender service members from serving in the armed forces. It is also referred to as ("DADT") *infra*.

[2] *See, e.g.*, *Lawrence*, 539 U.S. 558; *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); *Lustig*, 29 Eur. Ct. H.R. 548 (1999).

forces. This increasing recognition of privacy rights has also been applied to service members in other countries. Other nations, faced with similar issues, have held that homosexual service members deserve the same basic right to serve openly in the armed forces as their heterosexual equivalents. International judicial bodies that have addressed the issue have written opinions, and rendered legal decisions in favor of recognition of fundamental privacy rights for homosexual service members.

I.

Argument

A. Introduction

As a general rule, United States' law should be interpreted consistent with international law. *See Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) (holding that acts of Congress ought never to be construed to violate the law of other nations if any other possible construction remains). The Supreme Court embraced international human rights law prohibiting privacy violations against homosexuals in *Lawrence v. Texas* and cited the European Court of Human Rights' ("ECHR") ruling that found British buggery (sodomy) laws were a violation of privacy protections. 539 U.S. 558, 573 (2003), citing *Dudgeon v. the United Kingdom*, 45 Eur. Ct. H.R., ¶ 52 (ser. A) (1981).

The *Lawrence* court explained its departure from *Bowers* by citing a fundamental shift in the values the United States shares with a wider civilization:

> To the extent the *Bowers* decision relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*.

Lawrence, 539 U.S. 558, 576. In *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981) the ECHR held that a law criminalizing consensual homosexual conduct in Northern Ireland violated the right to respect for privacy protected by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

The ECHR has made clear that the privacy rights that compelled the decision in Dudgeon include the right to serve in the military. *See Lustig-Prean and Beckett v. United Kingdom,* 29 Eur. Ct. H.R. 548 (1999); *Smith and Grady v. United Kingdom*, 29 Eur. Ct. H.R. 493 (1999) (two separate cases holding that the United Kingdom's ban on homosexuals in its military violated protections for private life under Article 8[3] of the Convention).

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[3] Article 8 of the Convention provides:

¶1 Everyone has the right to respect for his private and family life, his home and his correspondence.

¶2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the

Although the United States is not a party to the ECHR, it is a party to International Covenant on Civil and Political Rights ("ICCPR").[4] Article 17 of the ICCPR provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.

This language is not identical to the sections of the ECHR discussed above and the United Nations Human Rights Committee ("HRC") has not yet ruled on the question of military service, but the HRC has ruled that the ICCPR protects the privacy rights of homosexual civilians in a widening range of contexts.[5] In *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) the HRC found that laws criminalizing consensual homosexual conduct violate protections for privacy under Article 17 of the ICCPR. The HRC further said it did not find it

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> law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[4] The United States signed the ICCPR treaty in 1977 and ratified it in 1992.
[5] The HRC also makes comments about the scope of the ICCPR's provisions and the compliance of the various countries who are a party to it.

necessary to consider whether there were also violations of articles 2[6] and 26[7]. However, for the purpose of those articles, they would have considered "sexual orientation" to be included in the reference to "sex" in both articles. This latter comment was in the nature of *obiter dictum*. *See also Young v. Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 12, 2003) (holding that denying pension rights to the surviving same-sex partner of an Australian war veteran violated discrimination protections in article 26 of the ICCPR).

Other ECHR cases decided under the Convention provide further evidence of a global trend that began with decriminalization, and has moved toward non-discrimination. Early cases in this area focused on decriminalization of buggery (sodomy) laws. *See Norris v. Ireland*. 142 Eur. Ct. H.R. (ser. A) (1988) (holding that sodomy laws in Ireland violated

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[6] Relevant portions of Article 2 state: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[7] Article 26 states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

the right to privacy); *Dudgeon*, 45 Eur. Ct. H.H. (ser. A) (1981); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993) (holding that sodomy laws in Cyprus violated the right to privacy under Article 8 of the Convention). A more recent case has focused on non-discrimination under Article 14. *See Mouta v. Portugal*, 1 FCR 653 (Eur. Ct. H.R.) (1999) (holding that a judge's denial of child custody to a gay father on the grounds of his sexual orientation violated Article 8 and Article 14 of the Convention).

The Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, and the U.N. Working Group on Arbitrary Detention have all affirmed the right to protection from discrimination based on sexual orientation.[8] In addition, the U.N. Human Rights Committee has called on States not only to repeal laws criminalizing homosexuality but also to include the prohibition of discrimination based on

[8] *See* Committee on Economic, Social and Cultural Rights, General Comment No 15, E/C.12/2002/11, January 20, 2002, ¶ 13; General Comment No 14, E/C.12/2000/4, August 11, 2000, ¶18. Committee on the Rights of the Child, General Comment No 4, CRC/GC/2003/4, July 1, 2003, ¶ 6; General Comment No 3, CRC/GC/2003/3, March 17, 2003, ¶ 8. Reports of the Working Group on arbitrary detention E/CN.4/2004/3, December 15, 2003, ¶ 73; E/CN.4/2003/8, December 16, 2002, ¶¶ 68-69, 76. Opinions adopted by the Working Group on arbitrary detention No 7/2002, Egypt, E/CN.4/2003/8/Add.1, and January 24, 2003. *See also* Study on non-discrimination as enshrined in Art. 2, ¶ 2, of the International Covenant on Economic, Social and Cultural Rights, Working paper prepared by Emmanuel Decaux, E/CN.4/Sub.2/2004/24, June 18, 2004, ¶ 22.

sexual orientation in their constitutions. [9] The Committee in *Young v. Australia* Communication No. 941/2000: Australia, CCPR/C/78/D/941/2000, September 18, 2003.stated that "Article 26 [also] comprises discrimination based on sexual orientation."

Very recently, the HRC has reminded the United States of its obligations regarding the ICCPR in *Concluding Observations: United States of America*, CCPR/C/USA/CO/3, September 15, 2006. The HRC found the following:

> The [United States] should acknowledge its legal obligation under articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation. The [United States] should ensure that its hate crime legislation, both at

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[9] *Concluding Observation: Namibia*, CCPR/CO/81/NAM, July 30, 2004. The Committee notes the absence of anti-discrimination measures for sexual minorities, such as homosexuals (arts. 17 and 26). The State party should consider, while enacting anti-discrimination legislation, introducing the prohibition of discrimination on grounds of sexual orientation. *Id*. at ¶ 22.

Concluding Observations: Egypt, CCPR/CO/76/EGY, November 28, 2002. The Committee notes the criminalization of some behaviors such as those characterized as "debauchery" (articles 17 and 26 of the Covenant). The State party should ensure that articles 17 and 26 of the Covenant are strictly upheld, and should refrain from penalizing private sexual relations between consenting adults. *Id*. at ¶ 19.

Concluding Observations: Lesotho, CCPR/C/79/Add.106, April 8, 1999. The Committee notes with concern that a sexual relationship between consenting adult partners of the same sex is punishable under law. The Committee recommends that the State party amend the law in this respect. *Id*. at ¶ 13.

> the federal and state levels, address sexual orientation-related violence and that federal and state employment legislation outlaw discrimination on the basis of sexual orientation.

Id. at ¶ 25. This statement from the HRC provides a specific example of how recent trends have moved toward non-discrimination as a basis for establishing equal privacy protections.

B. From Decriminalization to Non-Discrimination

The *Lustig* case was a consolidation of two cases in which the service members that had each exhausted domestic remedies in England and were granted leave to appeal to the ECHR. 29 Eur. Ct. H.R. at ¶¶ 1, 3. In *Lustig*, service members complained that their discharge from the Royal Navy solely because of their homosexuality constituted a violation of Article 8 of the Convention. *Id*. at ¶ 2. The Court held that there was indeed a violation of Article 8 of the Convention. *Id.* at ¶ 105. [10]

Mr. Lustig and Mr. Beckett argued many of the same points currently before this Court. *Id*. at ¶¶ 74-79. First, they argued that the Royal Navy could not, consistently with Article 8, rely on and pander to the prejudices of certain service members in the military. *Id*. at ¶ 76. Second, they argued

[10] For an extensive analysis of further implications of the *Lustig* case, see Sameera Dalvi, Homosexuality and the European Court of Human Rights: Recent Judgments Against the United Kingdom and Their Impact on Other Signatories to the European Convention on Human Rights, 15 U. Fla. J.L. & Pub. Pol'y 467, (2004).

that the prejudice that does exist is reinforced by the very existence of the policy. *Id*. at ¶ 77. Third, they argued that the Royal Navy ought to be required to substantiate its claims with hard evidence. *Id*. at ¶ 78.

The Court considered the investigations, and in particular the interviews of the applicants, to have been exceptionally intrusive, it noted that the administrative discharges had a profound effect on the applicants' careers and prospects and considered the absolute and general character of the policy, which admitted of no exception, to be striking. *Id.* at ¶¶ 84, 86. It therefore considered that the investigations conducted into the applicants' sexual orientation together with their discharge from the armed forces constituted especially grave interferences with their private lives. *Id*. at ¶64.

As to whether the Government had demonstrated "particularly convincing and weighty reasons" to justify those interferences, the Court noted that the Government's core argument was that the presence of homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. *Id*. at ¶ 87. The Government relied, in this respect, on the Report of the Homosexual Policy Assessment Team (HPAT) published in February 1996. *Id*. at ¶ 44. The Court found that, insofar as the views of armed forces' personnel outlined in the HPAT Report

could be considered representative, those views were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. *Id*. at ¶ 90. It was noted that the Ministry of Defense policy was not based on a particular moral standpoint and the physical capability, courage, dependability and skills of homosexual personnel were not in question. *Id*. at ¶ 89. Insofar as those negative views represented a predisposed bias on the part of heterosexuals, the Court considered that those negative attitudes could not, of themselves, justify the interferences in question any more than similar negative attitudes towards those of a different race, origin or color. *Id*. at ¶ 90.

While the Court noted the lack of concrete evidence to support the Government's submissions as to the anticipated damage to morale and operational effectiveness, the Court was prepared to accept that certain difficulties could be anticipated with a change in policy (as was the case with the presence of women and racial minorities in the past). *Id*. at ¶¶ 88, 95. It found that, on the evidence, any such difficulties were essentially conduct-based and could be addressed by a strict code of conduct and disciplinary rules. *Id*. The usefulness of such codes and rules was not undermined, in the Court's view, by the Government's suggestion that homosexuality would give rise to problems of a type and intensity that race

and gender did not, or by their submission that particular problems would arise with the admission of homosexuals in the context of shared accommodation and associated facilities. *Id*. at ¶¶ 96-99, 101. Finally, the Court considered that it could not ignore widespread and consistently developing views or the legal changes in the domestic laws of Contracting States in favor of the admission of homosexuals into the armed forces of those States. *Id*. at ¶ 97. Accordingly, convincing and weighty reasons had not been offered by the Government to justify the discharge of the applicants. *Id*. at ¶ 98.

As discussed above, the *Lustig* court's findings did not emerge *ex nihilo*. The findings were a natural progression of a line of cases beginning with *Dudgeon*, which was then followed by *Norris*, which held that sodomy laws in Northern Ireland violated an individual's right to privacy. *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) (1981); *Norris*, 142 Eur. Ct. H.R. (ser. A) (1988). The *Lustig* court's findings were based on the *Dudgeon* court's ruling that a homosexual man prosecuted for buggery (sodomy) suffered an unjustified interference with his right to respect for his private life and that a breach of Article 8 had therefore occurred. *Lustig*, 29 Eur. Ct. H.R. at ¶ 64. *Dudgeon's* crucial finding of a right to private homosexual conduct was relied upon and

cited both by the ECHR in *Lustig*, and the Supreme Court in *Lawrence*. *Lustig*, 29 Eur. Ct. H.R. ¶¶ 64, 86; *Lawrence*, 539 U.S. 558, 573.

Lustig extended this holding by finding that the right to privacy established in *Dudgeon* also applies to the military. *Lustig* did this after a thorough discussion of the numerous policy issues that application to the military raises, and found that none of those concerns warranted a special rule for the military. Just as the right to civilian privacy in *Dudgeon* was relied upon for a right to service member privacy in *Lustig*, this court should rely upon the right to privacy for civilians in *Lawrence* to protect the privacy rights of Major Witt and other United States service members. *See also United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004) (holding that Lawrence's protections should be extended to service members on an as-applied basis considering case-specific facts).

C. The Margin of Appreciation Given to the Military Does Not Apply to Unjustified Violations of Privacy

In accordance with *Dudgeon*, the *Lustig* court explained that in order to justify restrictions concerning "a most intimate part of an individual's private life," there must exist "particularly serious reasons" before such interferences can satisfy the requirements of Article 8 § 2 of the Convention. *Lustig*, 29 Eur. Ct. H.R. ¶ 82. In analyzing these cases, the court made a

special point to address its "margin of appreciation"[11] doctrine that it gives to "Contracting States" (signatories to the treaty) for discretionary, administrative decisions. *Id.* at ¶ 81, citing *Dudgeon v. the United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); *Vogt v. Germany*, 323 Eur. Ct. H.R. (ser. A) (1995)).

The *Lustig* court recognized that military effectiveness is a matter of special concern for all nations, and consequently granted substantial deference to the United Kingdom's policy regarding homosexuals. 29 Eur. Ct. H.R. ¶ 82. In explaining this margin, the court recognized that each State is "competent to organize its own system of military discipline." *Id*. The court began by explaining that States can impose restrictions on a service member's right to respect for his or her private life where there is a "real threat to the armed forces' operational effectiveness." *Id*. at ¶ 83.

However, striking down the United Kingdom's policy, the ECHR explained that "national authorities cannot rely on such rules to frustrate the exercise by individual members of the armed forces of their right to respect for their private lives, which right applies to service personnel as it does to others within the jurisdiction of the State." *Id*. Thus, even under this heightened level of deference given to the military of every nation under this

[11] This doctrine was fully analyzed in the case of *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (Ser. A) (1976).

doctrine, the Court found the right of the individual service members to private exercise of their sexuality remains protected.

II.

Integration in Other Countries Did Not Undermine Unit Cohesion, Combat Effectiveness, or Increase HIV Infection Rates

The ECHR asserted there was no factual basis for concerns raised by the United Kingdom regarding unit cohesion and combat effectiveness. *Lustig*, 29 Eur. Ct. H.R. 548, ¶ 88. In *Lustig*, the government raised concerns over the results of a government study that alleged service members would not like the integration and negative results would follow. *Id*. at ¶¶ 45, 46. These arguments are not new and they are not supported by the experience of other countries who have successfully integrated without suffering the dire consequences opponents of integration often suggest will follow.

In his article "Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?" Aaron Belkin discusses the United States' DADT policy within an international context.[12] The article was published in *Parameters*, a United States Army War College publication.

As Belkin explains, in other countries that previously had a ban on homosexual service members, many of the same arguments were used that

[12] Aaron Belkin, Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?, Parameters, U.S. Army War College Quarterly (Summer 2003).

are frequently raised by supporters of DADT. For example, he notes a 1985 survey of Canadian male service members finding that 65% of those surveyed indicated they would "refuse to share showers, undress, or sleep in the same room as a gay solider. Belkin, *Id*. at 111. By 1995 however, an internal report from the Canadian government concluded, "Despite all the anxiety that existed through the late 80's and into the early 90's about change in policy, here's what the indicators show – no effect." *Id*. at 111.

Belkin explains that "while scholars and experts continue to disagree whether lifting the ban would undermine military performance in the United States, evidence from studies on foreign militaries on this question suggests that lifting bans on homosexual personnel does not threaten unit cohesion or undermine military effectiveness." *Id*. at 108. This finding mirrors the actual experience of many other countries.

Not a single one of the 104 experts interviewed for the study believed that integration of homosexual service members with heterosexual service members had a negative impact in the way so many predicted. *Id*. at 109. He found that none of the "Australian, Canadian, Israeli, or British decisions to lift their gay bans undermined military performance, readiness, or cohesion, led to increased difficulties in recruiting or retention, or increased

the rate of HIV infection among the troops." *Id*. at 110.[13] Specifically, Stuart Cohen, an expert on the Israeli Defense Forces, has remarked that "homosexuals do not constitute an issue [with respect to] unit cohesion in the IDF. In fact, the entire subject is very marginal indeed as far as this military is concerned." *Id*. at 112.

Many members in a unit already know the sexual orientation of their fellow service members and are not affected by the change in policy as a result. *Id*. at 112. Belkin recounts an interview with Lieutenant Michelle Douglas, a lesbian, who simply told him that in the Canadian military "[g]ay people have never screamed to be really, really out. They just want to be really safe from being fired." *Id*. at 114. Major Witt deserves the same basic respect and protection for her private life that every heterosexual member of the armed forces enjoys.

Thus, it is clear that DADT violates international law. The United States should once again join the international community, as it did in *Lawrence*, by paying heed to the values that the United States shares with a wider civilization, and striking down 10 U.S.C. § 654.

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[13] Professor Elizabeth Kier of the University of Washington, whose declaration is a part of the record, is an expert on international security and civil-military relations and came to similar conclusions in her article: Homosexuals in the Military: Open Integration and Combat Effectiveness, International Security, Vol. 23, No. 2 (Fall 1998).

III.

Conclusion

For all these reasons, we ask that this court reverse the lower court's decision dismissing Major Witt's suit and remand for further proceedings.

DATED this 23rd day of October, 2006.

Respectfully submitted,

By:_____

Gwynne Skinner
Attorney for Amici Curiae
International Commission of Jurists and the Center for Constitutional Rights

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Case No. 06-35644

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 3854 words or less.

DATED: October 23rd, 2006

By:_____

Gwynne Skinner
Attorney for Amici Curiae
International Commission of Jurists and the Center for Constitutional Rights

CERTIFICATE OF SERVICE

I hereby certify that the following documents were sent via Federal Express Mail and U.S. Mail, postage prepaid, to the following on this 23rd day of October 2006:

1. Brief of Amici Curiae International Commission of Jurists and the Center for Constitutional Rights in Support of Plaintiff-Appellant and Reversal;

2. Certificate of Compliance; and

3. Certificate of Service.

Aaron Caplan Staff Attorney American Civil Liberties Union of Washington 705 Second Ave., Third Floor Seattle, WA 98104 ***ATTORNEYS FOR PLAINTIFF-APPELLANT***	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☐ Overnight Mail (via FedEx) ☐ Facsimile Transmission ☐ E-Mail Transmission– *Brief Only*
Anthony J. Steinmeyer Appellant Staff – Civil Division 950 Pennsylvania Ave., NW – Room 7529 Washington, D.C. 20530 (202) 514-3388 (202) 307-2551 – fax Anthony.steinmeyer@usdoj.gov ***ATTORNEYS FOR DEFENDANTS-APPELLEES***	☐ U.S. Mail, Postage Prepaid ☐ Hand Delivered ☒ Overnight Mail (via FedEx) ☐ Facsimile Transmission ☐ E-Mail Transmission– *Brief Only*

I certify and declare under the laws for the United States and the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 23rd day of October 2006 at Seattle, King County, Washington.

_____

Matt Midles