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NO. 70036-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMEL FIELDS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

A stranger who was the victim of a sudden, brief assault and robbery claimed Jamel Fields was the perpetrator. The two men are of different races. The single witness's identification was the only evidence against Mr. Fields. Defense counsel did not consult an expert or offer pertinent jury instructions on evaluating a stranger's identification. Unaware of the legal basis to challenge the complainant's identification and disappointed in the inability to find witnesses showing someone else committed the crime, Mr. Fields entered a guilty plea that acknowledged he was likely to be convicted but stated he did not believe he was guilty.

Mr. Fields immediately moved to withdraw this plea. An expert in eyewitness identification explained how Mr. Fields could have challenged the single eyewitness's identification if he went to trial. The trial court denied the motion, in part because it viewed the African-American Mr. Fields and the Hispanic complainant as people "of color," and found that problems plaguing cross-racial identification did not apply to them. The court misunderstood the deficiency in defense counsel's performance and should have permitted Mr. Fields the opportunity to withdraw his *Alford* plea.

B. ASSIGNMENTS OF ERROR.

1. Mr. Fields received ineffective assistance of counsel that led him to enter a guilty plea that was not knowing, intelligent, and voluntary.

2. The trial court erroneously denied Mr. Fields's motion to withdraw his guilty plea based on a misunderstanding of defense counsel's deficient performance.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

The right to meaningful assistance of counsel includes the right to be informed of available defenses before deciding that the likelihood of being convicted at trial is insurmountable. Mr. Fields entered a plea based on his understanding that he was likely to be convicted even though he was not guilty. He did not understand that he could have used an expert or jury instructions to challenge the accuracy of the complainant's identification of him as the perpetrator. Did Mr. Fields receive deficient performance of counsel based on his attorney's failure to pursue or explain to him a viable defense before he waived his right to trial based on his understanding that he had no potentially meritorious defense?

D. STATEMENT OF THE CASE.

While Francisco Barrera Villegas was talking on his cell phone and walking along Second Avenue near University Street in Seattle, at 9:35 p.m. on February 24, 2012, a group of people began yelling at him. CP 3, 5. They demanded his phone. CP 3. One man punched Mr. Barrera Villegas in the face and he fell to the ground. CP 257. Mr. Barrera Villegas covered his face as this person kicked him and took Mr. Barrera's phone and his backpack, which held his paycheck and work clothing. CP 257.

Mr. Barrera Villegas told police the suspect was a black male who was "maybe wearing a Seahawks jacket." CP 255. Although the suspect had reportedly walked to Third Avenue, a bicycle officer saw a black male wearing a jacket with a Seahawks logo walking on Second Avenue. CP 258. The police stopped a group of five individuals, three men and two women. One man, Jamel Fields, wore a jacket with Seahawk patches on it. CP 257. The police held Mr. Fields for a show-up identification and Mr. Barrera Villegas said Mr. Fields was the person who assaulted him. CP 257. Police found Mr. Barrera Villegas's empty backpack on a nearby street. CP 258. Mr. Fields did not have any of Mr. Barrera Villegas's property. CP 259.

Mattie Sinclair was with Mr. Fields when he was arrested and she told police that she saw the assault on Mr. Barrera Villegas and it was committed by a black male wearing a “BB cap with a Bulls logo,” small braids, and a black and gray hoody with red stripes. CP 259. The police did not look for this person. *Id.*

Two other witnesses saw the incident from across the street. CP 269. They saw a black man who had been shouting obscenities hit Mr. Barrera Villegas and tear his backpack away from him. *Id.* One of the witnesses described the perpetrator as “black, mid-twenties” wearing a leather jacket with patches “like a race jacket,” not a Seahawks jacket; the other witness gave no description other than “black guy.” CP 258, 269-270. Neither of these witnesses thought they would be able identify the perpetrator nor did they ever attempt an identification. CP 265.

Upon his arrest and throughout pretrial proceedings, Mr. Fields insisted he was not involved in the incident. CP 259; 2/8/13RP 9. His assigned attorney George Sjursen prepared for trial by trying to find witnesses who would say Mr. Fields was not the perpetrator. 2/8/13RP 10-11. He did not consult an expert or consider retaining one to educate the jury about the dangers of mistaken eyewitness identification. *Id.* at 14, 49.

While selecting a jury, Mr. Fields realized that his attorney's efforts to prove that someone else robbed Mr. Barrera Villegas was unlikely to succeed based on the one or two witnesses who could offer limited testimony that someone else did it. CP 193; 7/23/12RP 3; 7/24/12RP 2. Based on "evidentiary considerations," the prosecution offered Mr. Fields a plea to a reduced charge of second degree robbery. 7/24/12RP 2. Mr. Fields entered an *Alford* plea, informing the court that he did not believe he was guilty of the crime but believed there was a substantial likelihood he would be convicted after trial. CP 22-23. Shortly after entering the plea, he filed a motion to withdraw it and was appointed another attorney to assist him. CP 27.

Newly assigned attorney James Womack consulted with an expert in eyewitness identification, Jennifer Davenport, Ph.D. CP 37-38. Ms. Davenport reviewed the police investigation, including witness statements and a videotape of the identification procedure. CP 47. She identified a number of concerns undermining confidence in the complainant's identification of Mr. Fields as the perpetrator based on her knowledge of factors impacting eyewitness reliability. CP 47. These factors included the cross-racial nature of the identification; the short duration of the incident; the high level of stress involved in being

punched in the face and repeatedly kicked; the single-witness show up procedure arranged by the police where Mr. Fields was surrounded by six police officers; and the lack of credit that should be accorded to witness confidence. CP 47-49.

Although the trial court acknowledged the weight of evidence casting doubt on the reliability of eyewitness identification, the court ruled that defense counsel's failure to explore these issues when representing Mr. Fields did not constitute ineffective assistance of counsel. 2/8/13RP 61, 63, 67. Even though Mr. Fields and Mr. Barrera Villegas were not of the same race, the court deemed them both "people of color" and concluded that cross-racial identification issues would not apply. *Id.* at 65. The court also thought that since the identification was not cross-racial, an expert would not have been helpful to the jury to explain factors affecting eyewitness reliability. *Id.* The court denied Mr. Fields's motion to withdraw his guilty plea and imposed a standard range sentence. *Id.* at 67, 79.

E. ARGUMENT.

Mr. Fields did not knowingly, intelligently, and voluntarily waive his right to a jury trial when he entered a guilty plea based on a deficient performance by counsel

1. *A guilty plea must be knowingly, intelligently and voluntarily entered after receiving accurate advice from competent counsel.***Error! Bookmark not defined.**

A criminal defendant's waiver of his right to trial by jury and entry of a guilty plea must be an intentional relinquishment of a known right, indulging in every presumption against waiver. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); U.S. amends. 6, 14. An involuntarily entered plea establishes a manifest injustice permitting withdrawal of the plea. *State v. Turley*, 149 Wn.2d 395, 398, 69 P.3d 338 (2003).

A defendant is entitled to effective assistance in the process of plea negotiation. *Missouri v. Frye*, _ U.S. _, 132 S.Ct. 1399, 1405-06, 182 L.Ed.2d 379 (2012). "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler v. Cooper*, _ U.S. _, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012).

At the plea bargaining stage, “defendants cannot be presumed to make critical decisions without counsel’s advice.” *Id.* at 1385. Ineffective assistance of counsel occurs when “counsel’s representation fell below an objective standard of reasonableness,” and “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 1384 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

In *Frye*, the Supreme Court held that an attorney performs deficiently when he neglects to explain a better plea offer to his client, even when the client entered a guilty plea by way of a fully adequate colloquy waiving his trial rights. 132 S.Ct. at 1406. In *Lafler*, the Supreme Court further explained that a lawyer performs deficiently if he does not accurately convey the benefits of a plea offer so that the defendant turns down the offer and goes to trial. *Lafler*, 132 S.Ct. at 1388. Similarly, a client’s intent to plead guilty does not excuse a lawyer from adequately investigating the case or pursuing available avenues of relief. *State v. A.N.J.*, 168 Wn.2d 91, 113, 116, 118, 225 P.3d 956 (2010).

“The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.” *Frye*, 132 S. Ct. at 1407. “Anything less” than effective representation during plea bargaining “might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” *Id.* at 1407-08 (quoting *inter alia Spano v. New York*, 360 U.S. 315, 326, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) (Douglas, J., concurring)).

In determining whether a defense counsel’s representation of a defendant at the time of a plea met an objective standard of reasonableness, “courts must take into account all the information counsel knew or should have known at the time of the defendant's plea.” *Roe v. Flores–Ortega*, 528 U.S. 470, 471, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Although this decision to plead guilty is ultimately made by the defendant, the defendant's attorney must make an informed evaluation of the options and determine which alternative will offer the defendant the most favorable outcome. A defendant relies heavily upon counsel's independent evaluation of the charges and defenses, applicable law, the evidence and the risks and probable

outcome of a trial. The right to effective assistance of counsel includes an adequate investigation of the case to determine facts relevant to the merits or to the punishment in the event of conviction.

Copas v. Commissioner, 243 Conn. 139, 154, 662 A.2d 718 (1995).

2. *Defense counsel's failure to investigate or challenge the cross-racial eyewitness identification constituted deficient performance of counsel.*

One fundamental tenet of competent attorney performance is staying abreast of the law and developing changes in the law. In *Lafler*, the lawyer's incorrect legal advice to his client about the availability of a defense was undisputedly deficient. *See Lafler*, 132 S.Ct. at 1383-84. As changes in the law occur, a lawyer must be familiar with those developments and preserve them for his client. *In re Pers. Restraint of Netherton*, 177 Wn.2d 798, 802, 306 P.3d 918 (2013). In *Netherton*, the attorney performed deficiently by failing to preserve a challenge to a firearm enhancement when the Supreme Court was considering whether precise jury findings were required on the nature of the weapon. *Id.* at 803; *see also In re Pers. Restraint of Morris*, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012) (counsel's failure to recognize that court's closure of courtroom during voir dire constituted appealable issue constituted ineffective assistance of counsel).

The Rules of Professional Conduct state that “a lawyer should keep abreast of changes in the law and its practice.” RPC 1.1, cmt. 6. The RPCs “are evidence of what should [or must] be done.” RPC Scope [14]. A lawyer’s duty to “act with reasonable diligence” requires the attorney to “take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor” within the boundaries of professional discretion. RPC 1.3, cmt. 1.

Problems with eyewitness identification evidence have been widely recognized, particularly when they involve people of different races. *State v. Allen*, 176 Wn.2d 611, 616, 294 P.3d 679 (2013) (C. Johnson, J., lead opinion); see *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (“vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”); CP 56 (“Psychological research over the past century has consistently shown a high error rate in eyewitness identification.”).¹

Eyewitness identifications of strangers involved in brief, stressful incidents are prone to inaccuracy, as the trial court

¹ The Innocence Project Report, “Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of Misidentification,” 6 (2009).

acknowledged in the case at bar. 2/8/13RP 61; CP 47-49 (report on factors impacting eyewitness identification from expert Jennifer Davenport); *see Allen*, 176 Wn.2d at 621. Despite scientific studies showing the fallibility of eyewitness identification, it is the type of evidence in which jurors tend to place a high amount of confidence. *See* Elizabeth F. Loftus, *Eyewitness Testimony*, 9 (1979) (“[j]urors have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence”); CP 49 (describing juror reluctance to accept fallibility of eyewitness identification, in *State v. Henderson*, Report of Special Master, 49 (2010)).

Because many factors affecting eyewitness identification are unknown to average jurors or contrary to common assumptions, expert testimony “may prove vital” as a method to “educate the trier of fact” about the limitations of eyewitness evidence. *State v. Lawson*, 352 Or. 724, 291 P.3d 673, 696 (2012). There is “widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror.” *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705, 720 (2012). Many accepted findings about eyewitness identifications are counterintuitive. *Id.* at 724. Cross-examination is an “inadequate substitute for expert testimony” when explaining ways

jurors should view the weakness of an identification. *Id.* at 725-26; *see also Lawson*, 291 P.3d at 695. Justice Wiggins referred to cross-examination as

a useless tool for educating jurors about cross-racial bias. The very nature of the cross-racial problem is that witnesses are unaware of it; witnesses believe their identification is accurate, making traditional impeachment methods inadequate for ferreting out the truth.

Allen, 176 Wn.2d at 640 (Wiggins, J., dissenting).

Case-specific jury instructions may be a necessary mechanism for probing faulty eyewitness identifications. *Lawson*, 291 P.3d at 697. Jury instructions offer a critical legal framework for the jury to use when considering critical evidence or counsel's argument questioning the accuracy of an eyewitness identification. *See Allen*, 176 Wn.2d at 641 (Wiggins, J., dissenting).

Defense counsel did not consult an expert on eyewitness identification in his preparation. 2/8/13RP 14. He did not consider hiring an expert. *Id.* Only once in his career had he consulted an expert in eyewitness identification and he did not recall what that expert testified to in this prior case several years earlier. *Id.* at 8. He did not propose any jury instructions specific to eyewitness identifications even

though he presented the court with numerous other jury instructions for the case. 2/8/13RP 49.²

3. *Defense counsel did not adequately advise Mr. Fields of the possibility of challenging the out-of-court show-up identification that served as the only evidence against him.*

Defense counsel did not request a hearing on whether the show-up identification was impermissibly suggestive. When an identification procedure is both suggestive and likely to give rise to a substantial risk of misidentification, it must be suppressed. *State v. Hilliard*, 89 Wn.2d 430, 438, 573 P.2d 22 (1977); *Manson v. Brathwaite*, 432 U.S. 98, 144, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). Show-up identifications are inherently suggestive because the eyewitness views only those particular people that the police have identified as suspects. *State v. Ramirez*, 109 Wn.App. 749, 761, 37 P.3d 343, *rev. denied*, 146 Wn.2d 1022 (2002); *see State v. Herrera*, 902 A.2d 177, 183 (N.J. 2006).

The only evidence against Mr. Fields was the complainant's show-up identification. Other witnesses saw the incident but none identified Mr. Fields as the perpetrator. CP 265. The complainant's

² Although an instruction on eyewitness identification is not constitutionally required, "every member of this [Supreme C]ourt would support giving a cross-racial identification instruction in an appropriate case." *State v. Allen*, 176 Wn.2d 611, 621, 635-36, 294 P.3d 679 (2013) (C. Johnson, J.,

identification was the product of a show-up procedure arranged by the police that defense counsel did not challenge.

Defense counsel did not discuss with Mr. Fields any legal issues involving incorrect eyewitness identification. 2/8/13RP 33; CP 193. Defense counsel's focus was on proving that another person committed the crime, not that the out-of-court identification was faulty. 2/8/13RP 17, 32, 52-53. When Mr. Fields pled guilty during jury selection, he believed the only defense that would be mounted was an attempt to show another person was the perpetrator. CP 193; 2/8/13RP 11.

Defense counsel subpoenaed two witnesses to testify: Mr. Fields' sister Angel Turner and Sirronald Hicks. 2/8/13RP 11. Ms. Turner had not seen the incident; she had been in the liquor store when the incident happened. *Id.* at 43. She saw Greg Hughes at the scene, although she did not know his name. *Id.* at 15-16, 43. Defense counsel admitted he was "a little murky" about how Ms. Turner knew Mr. Hughes. 2/23/12RP 8.

Defense counsel had subpoenaed Mr. Hicks and hoped he would come to court. 2/23/12RP 10. He thought Mr. Hicks would say someone whose name he did not know committed the crime; he had not

plurality; Wiggins, J., dissenting).

confirmed whether Mr. Hicks would identify Mr. Hughes as the perpetrator. *Id.* at 11. Another person at the scene, Maddie Sinclair, had told police that someone else assaulted the complainant but defense counsel had not been able to interview this witness. *Id.* at 9.

Defense counsel attempted to subpoena the person that Mr. Fields would identify as the perpetrator, Gregory Hughes, but defense counsel had never spoken to Mr. Hughes and did not expect him to admit his own culpability. He hoped Mr. Hughes would come to court, take the stand, and “take the Fifth Amendment” in front of the jury. *Id.* at 31. He “had not been successful” in subpoenaing Mr. Hughes so that he might come to court. *Id.*

On the day of trial, defense counsel “finally got in touch with” two of the State’s witnesses and they recalled the perpetrator as wearing a NASCAR jacket, not a Seahawks jacket as the complainant described. 2/8/13RP 15.

Mr. Fields was disappointed that more witnesses would not come forward to show someone else was responsible for taking the complainant’s property by force. 2/8/13RP 2. He was unaware of the empirical studies and case law casting doubt on eyewitness identifications. *Id.* Mr. Fields did not know that an expert witness could

explain the difficulties in accurate identifications of strangers viewed only in a brief encounter, particularly when the stranger is a person of a different race. CP 193. If defense counsel had explained to him that he had an ability to present a defense that would support his sister's testimony, he would have pursued that defense. *Id.* He would not have pled guilty if he had been aware of the ability to mount another defense, even if he risked increased punishment. *Id.*

The trial court ruled Mr. Sjurson had not been deficient in his approach to the eyewitness identification based on its misunderstanding of the significance of defense counsel's inadequate efforts to challenge the accuracy of the complaining witness's identification of Mr. Fields. The court believed that because the complainant Mr. Barrera Villegas is "a person of color" the identification was unencumbered by cross-racial fallibility. 2/8/13RP 62, 65. However, Mr. Fields is African-American and Mr. Barrera Villagas is Hispanic. CP 48.

Research shows that "own-race-bias" impairs a witness's ability to accurately identify a stranger of a different race. *See* John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 *Am. J. Crim. L.* 207, 211 (2001). "Psychological studies have consistently found that people are far better at recognizing

faces of members of their own race than those of other races.” Radha Natarajan, Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications, 78 N.Y.U.L. Rev. 1821, 1834 (2003). The court misunderstood a competent counsel’s ability to challenge the accuracy of the complainant’s initial identification of Mr. Fields and erroneously found defense counsel had not performed deficiently based on the misunderstanding that persons “of color” are not affected by own-race bias.

Mr. Fields did not admit his guilt when he pled guilty, but rather he acknowledged that he was likely to be convicted at trial even though he did not believe he was guilty. CP 22-23. His assessment of the evidence against him and the effectiveness of his defense was premised on defense counsel’s failure to consult an expert, use jury instructions, or explain to Mr. Fields his ability to challenge the accuracy of the one witness’s identification that served as a sole evidence against him at trial. CP 193.

4. *Mr. Fields was prejudiced by his attorney’s failure to investigate and explain the weakness of the eyewitness identification.*

A defendant sufficiently proves he was prejudiced by his attorney’s unreasonable advice if there is a “reasonable probability” that

but for counsel's errors, he would not have entered this plea. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L. Ed .2d 203 (1985); *State v. Sandoval*, 171 Wn.2d 163, 174-75, 249 P.3d 1015 (2011).

A “reasonable probability exists if the defendant ‘convince[s] the court that a decision to reject the plea bargain would have been rational under the circumstances.’” *Sandoval*, 171 Wn.2d at 174-75 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)). “This standard of proof is ‘somewhat lower’ than the common ‘preponderance of the evidence’ standard.” *Id.* at 175 (citing *Strickland*, 466 U.S. at 694).

Mr. Fields was planning on going to trial throughout the pretrial proceedings and his lawyer never expected him to take a guilty plea based on his claim of innocence. CP 259; 2/8/13RP 9. Because the prosecution refused to offer a plea to an offense that was not a “strike” eligible crime, Mr. Fields did not gain the most important benefit by pleading guilty, although he did receive a reduced sentence. 2/8/13RP 18. He had a prior conviction that defense counsel believed was a “strike” or most serious offense, and even though his plea involved a reduced charge, it would make him vulnerable to a three-strike sentence

of life without the possibility of parole upon conviction for another most serious offense. *Id.*; see RCW 9.94A.030(32).

Mr. Fields explained that he wanted to withdraw his plea even if he faced far greater prison time. CP 193. He accepted the plea only because he did not know about the availability of a meaningful and legitimate defense and his attorney was not pursuing a defense that would be likely to prevail. See CP 22-23, 193. Due to his attorney's deficient investigation into as well as his failure to explain available challenges to the accuracy and reliability of a cross-racial stranger identification after a stressful, brief encounter, Mr. Fields pled guilty. Mr. Fields's desire to go to trial from the inception of the case shows it was reasonably probable that he would have gone to trial if he understood the available defenses. He should be permitted the opportunity to withdraw his plea.

F. CONCLUSION.

For the reasons stated above, Mr. Fields respectfully asks this Court to remand his case so that he may have the opportunity to withdraw his guilty plea.

DATED this 31st day of December 2013.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Nancy P. Collins".

NANCY P. COLLINS (WSBA 28806)
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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70036-7-I
v.)	
)	
JAMEL FIELDS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF DECEMBER, 2013, 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> JAMEL FIELDS (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	() () (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF DECEMBER, 2013.

X _____ 

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