

72961-6

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NO. 72961-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RICHARD AZPITARTE,

Appellant,

v.

KING COUNTY, DENOBI OLEGBA, ELIZABETH DERAITUS,
STEPHANIE WARDEN, LAMAR REED, SCOTT LAVIELLE, and
SYDNEY JACKSON

Respondents.

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BRIEF OF RESPONDENTS

DANIEL T. SATTERBERG
King County Prosecuting Attorney

John R. Zeldenrust, WSBA No. 19797
Mark G. Stockdale, WSBA #17326
Senior Deputy Prosecuting Attorneys
Attorneys for Respondents
King County Administration Building
500 Fourth Avenue, Suite 900
Seattle, Washington 98104
(206) 296-0430

ORIGINAL

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I. INTRODUCTION

Appellant Rick Azpitarte sued the King County defendants twice in federal court and a third time in state court over code violation disputes concerning the number of cars Azpitarte maintained on his property. Although his various complaint allegations go back over 25 years, court rulings in Azpitarte's first two lawsuits narrowed his claims to a single issue: did the King County defendants harass him by flying helicopters over his house after March 3, 2009?

The federal district court in Azpitarte's second lawsuit ruled that, despite having a full and fair opportunity to present evidence on this issue, Azpitarte failed to show any evidence of helicopter harassment after March 3, 2009. Indeed, after March 3, 2009, Azpitarte did not even live at the locations where he claimed the helicopter hovering occurred.

The present case is Azpitarte's appeal from the dismissal of his third lawsuit, which he brought in state court. Azpitarte's factual allegations in this case were essentially "cut and pasted" from the complaint in Azpitarte's second federal lawsuit. Again, the only issue was whether the King County defendants had harassed Azpitarte with helicopter flights after March 3, 2009. Because this issue was fully and finally determined in Azpitarte's second federal lawsuit, the superior court

dismissed Azpitarte's complaint based on collateral estoppel and/or res judicata. There was no error, and the King County defendants therefore ask this Court to affirm.

II. STATEMENT OF THE CASE

The events Richard Azpitarte alleges occurred prior to March 3, 2009 (*see* Amended Opening Brief, at 2-8); although not actionable in this case, provide some useful background context. Azpitarte contends that after he won a discrimination lawsuit against King County in 1989, the county, in the late 1990s, began retaliating against him by enforcing zoning code provisions against his property, trespassing on his property and towing his cars away, and using a helicopter to hover over his property. *See* Amended Opening Brief, at 3-4. Azpitarte filed three lawsuits against the King County defendants based on these allegations.¹ The specific claims Azpitarte asserted in each lawsuit are summarized in Appendix A, which is appended to this brief.

¹Supp. CP __ (Sub. 29, Declaration of Mark G. Stockdale in Support of Defendants' Amended Motion for Summary Judgment, Exhibit A: First Amended Complaint, Azpitarte v. King County et al., KCSC No. 07-2-27781-1, removed to federal district court on December 14, 2007 under cause no. 07-1998-JCC (first lawsuit); Exhibit C: Complaint in Azpitarte v. King County, et al., filed July 21, 2010 in federal district court under cause no. 10-1186-TSZ (second lawsuit); Exhibit F: Complaint in Azpitarte v. King County, et al., filed November 30, 2011 in Snohomish County Superior Court under cause no. 11-2-10123-0, subsequently re-filed on change of venue in King County Superior Court under cause no. 13-2-35033-5 SEA).

- a. The federal court dismissed Azpitarte I on March 3, 2009 for failure to prosecute.

Azpitarte filed his first lawsuit (Azpitarte I) in King County Superior Court, and defendants removed the action to federal court in December 2007. On March 3, 2009, the court dismissed the case with prejudice for failure to prosecute.² The court found that plaintiff and his attorney had “exhibited a pattern of unprofessionalism and unreasonable delay throughout the entire litigation . . .”³ As a result of this dismissal, and the preclusive effect given it in the second federal lawsuit (see below), none of Azpitarte’s pre-March 3, 2009 allegations (*see* Amended Opening Brief, at 2-8) remain actionable in this case.⁴

- b. The federal court dismisses Azpitarte II based on res judicata and failure to state a claim, and Azpitarte appeals the entire case to the Ninth Circuit Court of Appeals.

Azpitarte filed a second lawsuit in federal court (Azpitarte II) on July 21, 2010. Many of the same facts Azpitarte alleged in Azpitarte I were “cut and pasted” into his complaint in Azpitarte II. He alleged identical federal claims, but his state claims were slightly different.⁵ The King County defendants argued that Azpitarte II was precluded by the

²Supp. CP __ (Sub. 29, Stockdale decl., Exhibit B).

³Supp. CP __ (Sub. 29, Stockdale decl., Exhibit B, page 11).

⁴*See* Supp. CP __ (Sub. 29, Stockdale decl., Exhibit G at 2 (Memorandum decision)).

⁵Supp. CP __ (Sub. 29, Stockdale decl., Exhibit C). *See also* Appendix A.

dismissal with prejudice of Azpitarte I, and moved to dismiss Azpitarte II based on res-judicata.⁶

On June 23, 2011, the district court granted defendants' motion, dismissing all claims arising before March 3, 2009 with prejudice based on res-judicata.⁷ Although Azpitarte alleged continuing helicopter harassment after March 3, 2009, the district court ruled these allegations failed to state a claim under 42 U.S.C. § 1983. The court therefore dismissed Azpitarte's claims "arising after March 3, 2009" without prejudice.⁸ The court denied Azpitarte's motion to reconsider on August 2, 2011, and on September 1, 2011, Azpitarte filed a general notice of appeal of the court's June 23, 2011 and August 2, 2011 orders to the Ninth Circuit United States Court of Appeals.⁹

c. While Azpitarte II is pending before the Ninth Circuit, Azpitarte files Azpitarte III in state court asserting the same state claims.

On November 30, 2011, Azpitarte filed the present lawsuit, Azpitarte III, in state court. His factual allegations in Azpitarte III are identical to his factual claims in Azpitarte II, but he alleged only state law

⁶Supp. CP __ (Sub. 29, Stockdale decl. Exhibit D).

⁷Supp. CP __ (Sub 29, Stockdale decl., Exhibit D at 3-4).

⁸*Id.* at 4-5.

⁹Supp. CP __ (Sub. 29, Stockdale decl., Exhibit E).

claims. They were the same state law claims Azpitarte alleged in Azpitarte II, and these claims were pending on appeal before the Ninth Circuit in Azpitarte II.¹⁰

- d. The Ninth Circuit reinstates Azpitarte's "helicopter harassment" claims arising after March 3, 2009 in Azpitarte II.

In January 2013, the Ninth Circuit Court of Appeals agreed that all of Azpitarte's state and federal claims arising before March 3, 2009 in Azpitarte II were barred by res judicata; however, the court reinstated Azpitarte's § 1983 claim alleging helicopter harassment after March 3, 2009, ruling that he had adequately stated a claim.¹¹

- e. On remand, Azpitarte fails to present evidence of helicopter harassment after March 3, 2009, and the federal court dismisses all of his claims in Azpitarte II with prejudice.

On remand in Azpitarte II, the King County defendants moved for summary judgment, arguing that Azpitarte had presented no evidence of helicopter harassment after March 3, 2009.¹² Azpitarte requested and was granted additional time to present materials to refute this claim.¹³

Nonetheless, Azpitarte failed to present evidence of helicopter harassment

¹⁰Supp. CP ___ (Sub. 29, Stockdale decl., Exhibit F). *See also* Appendix A.

¹¹Supp. CP ___ (Sub 29, Exhibit G).

¹²Supp. CP ___ (Sub 29, Stockdale decl., Exhibit H, at 2).

¹³*Id.*

arising after March 3, 2009.¹⁴ In fact, his own declaration made clear that he did not even live at the primary locations where he claimed the helicopters were hovering after that date. CP 58. *See also* CP 1-7.

The federal district court therefore dismissed Azpitarte's remaining state and federal claims with prejudice on October 8, 2014.¹⁵ Azpitarte moved to reconsider, arguing that the federal court lacked jurisdiction to grant summary judgment against him on his state law claims. The court disagreed, ruling that it had jurisdiction to dismiss Azpitarte's state and federal claims alleging helicopter harassment arising after March 3, 2009. CP 76.

The record contains no evidence that Azpitarte successfully appealed the federal district court's orders of October 8, 2014 or November 5, 2014 to the Ninth Circuit Court of Appeals, or that any appeal remains pending in Azpitarte II.

f. The state court dismisses Azpitarte's third lawsuit based on res judicata/collateral estoppel.

The King County defendants then moved to dismiss Azpitarte III (this case) based on the preclusive effect of Azpitarte II. The superior

¹⁴*Id.*, Exhibit H, at 2-3.

¹⁵Supp. CP ___ (Sub. 29, Stockdale decl., Exhibit H, at 2).

court dismissed Azpitarte's claims based on res judicata/collateral estoppel (CP 84-85), and Azpitarte brought this appeal.

III. ARGUMENT

A. STANDARD OF REVIEW

When reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court. *Kuhlman v. Thomas*, 78 Wn. App. 115, 119, 897 P.2d 365 (1995). An order of summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). The court considers the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Kuhlman*, 78 Wn. App. at 119-120.

Under this standard of review, whether collateral estoppel applies to bar relitigation of an issue is reviewed de novo. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). Also under this standard of review, the court determines whether the trial court erred, as a matter of law, by granting defendants' summary judgment motion to dismiss on the basis of res judicata. *See Kuhlman*, 78 Wn. App. at 120.

**B. AZPITARTE'S CLAIMS ARE BARRED BY
COLLATERAL ESTOPPEL**

In his Amended Opening Brief, Azpitarte devotes virtually all of his argument to the issue of res judicata, arguing that this doctrine cannot apply to bar his state claims in Azpitarte III because the court in Azpitarte II lacked subject matter jurisdiction to dismiss them. Amended Opening Brief, at 10-12. Although he is incorrect, as demonstrated below, he overlooks that his state claims in Azpitarte III are barred by collateral estoppel regardless of whether the court had jurisdiction over these claims in Azpitarte II.

Like the doctrine of res judicata, which bars relitigation of a *claim* once it has been decided, the doctrine of collateral estoppel, or *issue* preclusion, prevents relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993).

Before the doctrine of collateral estoppel may be applied, the party asserting the doctrine must prove: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2)

the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice. *Hanson*, 121 Wn.2d at 562.

All elements are satisfied here. As a result of the preclusive effect of the Ninth Circuit's ruling, Azpitarte's state and federal claims in Azpitarte II – as well as his identical state claims in Azpitarte III – were limited to whether he had experienced helicopter harassment after March 3, 2009.¹⁶ The federal court in Azpitarte II ruled that Azpitarte had failed to present any evidence of helicopter harassment after March 3, 2009.¹⁷ Thus, the issue decided in the prior adjudication (Azpitarte II) is the same as the issue decided in Azpitarte III.

The prior adjudication (Azpitarte II) ended with a final judgment on the merits, and Azpitarte was a party in both Azpitarte II and III. Finally, application of the doctrine will not work an injustice. As the federal court in Azpitarte II observed, “[p]laintiff was given ample opportunity to put forward evidence of harassment by helicopter occurring after March 3, 2009, and he failed to do so.” CP 76.

¹⁶See Supp. CP __ (Sub. 29, Stockdale decl., Exhibit G).

¹⁷Supp. CP __ (Sub. 29, Stockdale decl., Exhibit H, at 2).

C. THE SUPERIOR COURT PROPERLY DISMISSED AZPITARTE III BASED ON RES JUDICATA BECAUSE THE FEDERAL COURT HAD PREVIOUSLY DISMISSED THE SAME CLAIMS WITH PREJUDICE IN AZPITARTE II.

Azpitarate's claims are also barred under the doctrine of res judicata. Claim preclusion, more traditionally called res judicata, is a doctrine designed to curtail the relitigation of a claim or cause of action. *Loveridge v. Fred Meyer, Inc.*, 72 Wn. App. 720, 724, 864 P.2d 417 (1993). Under principles of federal supremacy, a federal judgment must be given full faith and credit in the state courts, which includes recognition of the res judicata effect of the federal judgment. *Id.*

In determining the preclusive effect of the federal court's orders dismissing Azpitarate's state law claims against the King County defendants, this court applies federal law. Restatement (Second) of Judgments, § 87 (1982); *Déjà Vu-Everett-Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 262, 979 P.2d 464 (1999). Azpitarate is barred from presenting in Azpitarate III all grounds of recovery that could have been presented in his second federal lawsuit (Azpitarate II), whether they were or not, if the federal court action was a suit between the same parties on the same causes of action, and concluded in a final judgment on

the merits. *See Déjà Vu*, 96 Wn. App. at 262, citing *International Union of Operating Engineers v. Karr*, 994 F.2d 1426, 1429 (9th Cir. 1993).

Azpitarate II involved the same parties as Azpitarate III. Both cases alleged the exact same state claims, and the factual allegations in the two cases are identical.¹⁸ The federal court's dismissal of Azpitarate's state claims in Azpitarate II was a final judgment on the merits. Thus, the elements of res judicata are satisfied and the federal court's dismissal precluded Azpitarate's assertion of the same state claims in Azpitarate III.

D. AZPITARATE'S CONTENTION THAT THE FEDERAL COURT IN AZPITARATE II LACKED JURISDICTION OVER HIS STATE CLAIMS IS MERITLESS.

Azpitarate contends there was no final judgment on the merits on his state claims in Azpitarate II because the federal court lacked jurisdiction over his state claims and the judgment is therefore void. Amended Opening Brief, at 11-12. Under Azpitarate's theory, the federal court in Azpitarate II lost jurisdiction over his state claims when it initially dismissed them without prejudice in the court's June 23, 2011 Order. This, Azpitarate argues, left him free to assert his state law claims in his third state court lawsuit. *Id.*

¹⁸Compare Supp. CP ___ and ___ (Compare Sub. 29, Stockdale decl. Exhibit C, pages 2-3 (Complaint in Azpitarate II) with Exhibit F, at 2-3 (Complaint in Azpitarate III).

1. Azpitarate cannot collaterally attack the federal court's determination in Azpitarate II that it had jurisdiction over his state law claims.

Azpitarate's argument ignores that the federal court in Azpitarate II expressly ruled that it had jurisdiction over Azpitarate's state law claims after the Ninth Circuit remand,¹⁹ and nothing in the record shows that Azpitarate properly appealed this ruling. The propriety of the federal court's assertion of jurisdiction in Azpitarate II is therefore final and binding:

A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not ... reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal.

The question is not whether the issue of subject matter jurisdiction was actually litigated, but instead whether the parties had the opportunity to raise the question. *If the parties against whom the judgment was rendered did not appeal, the judgment becomes final and the court's subject matter jurisdiction is insulated from collateral attack.*

(citations omitted; italics added) *Royal Insurance Company of America v.*

Quinn-L-Capital Corporation, 960 F.2d 1286, 1293 (5th Cir. 1992).²⁰

¹⁹See Supp. CP __ (Sub. 29, Stockdale decl. Exhibit H); CP 76.

²⁰See also *Insurance Corp. of Ireland, LTD v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 note 9, 102 S.Ct. 2099 (1982) (party who has had opportunity to litigate question of subject matter jurisdiction may not reopen that question in collateral attack on

2. The federal court had jurisdiction over Azpitarte's state claims in Azpitarte II.

In any event, Azpitarte's argument lacks merit. Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over a state claim if "the district court has dismissed all claims over which it has original jurisdiction, . . .". Even if the district court declined supplemental jurisdiction over Azpitarte's state law claims when it dismissed them without prejudice, the Order was final and appealable,²¹ and Azpitarte appealed *the entirety* of the order along with the district court's order denying reconsideration.²²

Azpitarte's appeal of both orders gave the Ninth Circuit Court of Appeals appellate jurisdiction over the entire case, including Azpitarte's state law claims. *See United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984) (notice of appeal confers appellate jurisdiction if the intent to appeal a specific

adverse judgment; principles of res judicata apply to determinations of subject matter jurisdiction); *Donovan v. Mazzola*, 761 F.2d 1411, 1416 note 2 (9th Cir. 1985).

²¹*See Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001) (although dismissal without prejudice is usually not a final decision, where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable).

²²Supp. CP __ (Sub. 29, Stockdale decl., Exhibit E).

judgment can be fairly inferred); Fed.R.App.P. 3(c)(1)(B).²³ The Ninth Circuit recognized this in its ruling when it stated that Azpitarte had appealed the dismissal of both his federal and state claims:

Richard Azpitarte appeals pro se from district (sic) court's judgment dismissing his 42 U.S.C. §1983 action alleging violations under the Fourteenth Amendment *and Washington state tort law* as barred by the doctrine of claim preclusion *and for failure to state a claim.*[²⁴]

Because the *only* basis for the district court's dismissal of Azpitarte's state claims was its dismissal of his § 1983 claim, *see* 28 U.S.C. § 1367(c)(3), when the appellate court reinstated Azpitarte's § 1983 claim and remanded, the federal court once again had supplemental jurisdiction over the state claims.

E. AZPITARTE'S DISCOVERY ALLEGATIONS ARE MERITLESS.

Azpitarte contends he should have been allowed further discovery. Amended Opening Brief, at 12-14. His arguments in this section of his brief contain no citations to the record and no citations to authority, and

²³ This would not necessarily preclude the superior court in Azpitarte III from having concurrent jurisdiction over Azpitarte's state law claims. Azpitarte sought monetary relief in Azpitarte III (Supp. CP __, Stockdale decl., Exhibit F, p. 5) and in such instances, "both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as res judicata in the other." *Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schmader*, 294 U.S. 189, 195, 55 S.Ct. 386 (1935). That is what occurred here.

²⁴(italics added) Supp. CP __ (Sub. 29, Stockdale decl. Exhibit G. at 2-3).

should be disregarded for this reason. *See* RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument unsupported by reference to the record or citation to authority will not be considered).

Azpitarte's discovery arguments are meritless in any event. Although he contends he brought a motion to compel discovery in this case, *see* Amended Opening Brief, at 13, what he fails to acknowledge is that the trial court expressly ruled that he did *not*. CP 52-53. Azpitarte makes no effort to dispute or even discuss this ruling in his Amended Opening Brief. This court should therefore not entertain any argument Azpitarte makes on appeal that the trial court improperly denied his alleged motion to compel.

Finally, Azpitarte's discovery arguments, though unclear and unsubstantiated, appear to relate to events having no relevance in this case. The only issue in Azpitarte III was whether Azpitarte had experienced helicopter harassment *after* March 3, 2009. No events allegedly occurring prior to that date are actionable.²⁵ Yet he continues to complain about

²⁵*See* Supp. CP ___ (Sub. 29, Stockdale decl., Exhibit G and H).

discovery on matters allegedly occurring many years or even decades ago.
See Amended Opening Brief at 13-14.

For example, he complains about “notices” being posted on his property, *Id.* at 13, although it is clear from his declaration that such events – assuming they occurred – took place before 2007. CP 73. He also claims an entitlement to records going back ten to twenty years on his retaliation claim, Amended Opening Brief, at 13, seemingly oblivious to court rulings that he had no claim for any events occurring before March 3, 2009.

As noted by the federal court in Azpitarte II, Azpitarte had ample opportunity to engage in discovery on issues relevant to this action,²⁶ and his unsubstantiated claim to the contrary should be disregarded.

IV. CONCLUSION

Richard Azpitarte has had his day in court. In fact, he has had many days in court over the past eight years in three separate lawsuits. These lawsuits gave him ample opportunity to present evidence to support his claims against the King County defendants, and he failed to do so. It is now time for this litigation to end. The King County Superior Court

²⁶Supp. CP __ (Sub. 29, Stockdale decl., Exhibit H at 2; CP 76).

properly granted respondents' motion for summary judgment dismissing this case with prejudice (CP 84-85), and this court should affirm.

DATED this 8th day of January, 2016.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 

JOHN R. ZELDENRUST, WSBA #19797
MARK G. STOCKDALE, WSBA #17326
Senior Deputy Prosecuting Attorneys
Attorneys for King County Defendants

APPENDIX A

First Federal Lawsuit (<u>Azpitate I</u>)	Second Federal Lawsuit (<u>Azpitate II</u>)	Third Lawsuit (<u>Azpitate III</u>)
<u>Cause of Action #1:</u> Retaliation RCW 49.60 Discrimination against persons who oppose discrimination (state claim)	<u>Cause of Action #1:</u> Retaliation RCW 49.60 Discrimination against persons who oppose discrimination (state claim)	<u>Cause of Action #1:</u> (Retaliation RCW 49.60 Discrimination against persons who oppose discrimination (state claim)
<u>Cause of Action #2:</u> Violation of the Fourteenth Amendment Due Process Clause (federal claim)	<u>Cause of Action #2:</u> Violation of the Fourteenth Amendment Due Process Clause (federal claim)	<u>Cause of Action #2:</u> Constructive eviction (state claim)
<u>Cause of Action #3:</u> Violation of the Fifth and Fourteenth Amendment Taking Clause (federal claim)	<u>Cause of Action #3:</u> Violation of the Fifth and Fourteenth Amendment Taking Clause (federal claim)	<u>Cause of Action #3:</u> Common law nuisance (state claim)
<u>Cause of Action #4:</u> Violation of the State Constitution due process clause (state claim)	<u>Cause of Action #4:</u> Constructive eviction (state claim)	<u>Cause of Action #4:</u> Trespass (state claim)
<u>Cause of Action #5:</u> Conversion (state claim)	<u>Cause of Action #5:</u> Common law nuisance (state claim)	<u>Cause of Action #5:</u> Malicious Prosecution and abuse of process (state claim)
<u>Cause of Action #6:</u> Common law nuisance (state claim)	<u>Cause of Action #6:</u> Trespass (state claim)	
<u>Cause of Action #7:</u> Negligence (state claim)	<u>Cause of Action 7:</u> Malicious prosecution and abuse of process (state claim)	
<u>Cause of Action #8:</u> Trespass (state claim)		

CERTIFICATE OF FILING & SERVICE

I hereby certify that on the 8th day of January, 2016, I filed the foregoing document with the Court of Appeals, Division I and further certify that I served a copy of the same via U.S. Mail on the following:

**Richard Azpitarte
1533 S. 120th Street
Seattle, WA. 98168**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of January, 2016.



LINDA KHAMPRADITH
Legal Secretary
King County Prosecuting Attorney's Office