

No. 33077-6-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

BRIAN PHILLIP HUTTON

Appellant.

SUPPLEMENT TO OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 03-1-04822-6
The Honorable Katherine M. Stolz,
Judge of Pierce County Superior Court

FILED
COURT OF APPEALS
06 JUN 15 PM 4:58
STATE OF WASHINGTON
BY *WJ*

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ORIGINAL

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A. ASSIGNMENT OF ERRORS

1. Error is assigned to the trial court's finding that alleged *Ferrier* warnings was signed by Mr. Hutton. RP 187-189.
2. Error is assigned to the trial court excluding the defense's handwriting expert from testifying at trial. RP 196.
3. Error is assigned to the trial courts findings as to disputed facts, no. 2.
4. Error is assigned to findings of fact No. 10.
5. Error is assigned to findings of fact No. 12.
6. Error is assigned to findings of fact No. 15.
7. Error is assigned to findings of fact No. 16.
8. Error is assigned to the trial court sentencing Mr. Hutton to a sentence within the standard range of 100 – 120 months for manufacturing methamphetamine, where the judge, not the jury found that Mr. Hutton was manufacturing methamphetamine. CP-26, CP-32.

B. ISSUES PERTIANING TO ASSIGNMENTS OF ERRORS

1. The trial court erred when it found that the signature on the Consent to Search form was Mr. Hutton's.
2. The trial court abused its discretion when it failed to allow the handwriting expert to testify at trial regarding the signature on the alleged consent form.
3. The trial court erred where it sentenced Mr. Hutton to a sentence within the standard range of 100 – 120 months for manufacturing methamphetamine, where the judge, not the jury found that Mr. Hutton was manufacturing methamphetamine.

C. STATEMENT OF THE CASE

Factual and Procedural Background

A CrR 3.6 hearing was held on February 3, 2005 through February 7, 2005, and on February 7, 2005, the court issued its ruling denying Mr. Hutton's motion to suppress. RP 186-187. During the hearing, the trial court said that handwriting comparisons were a matter for an expert witness. RP 83. The defense called Hannah McFarland as an handwriting expert. RP 127. The trial court qualified Ms. McFarland as an expert in handwriting analysis. RP 127. After Ms. McFarland examined approximately 15 different original signatures signed by Mr. Hutton, and examined the original Consent to Search form, Ms. McFarland determined that the signature on the Consent to Search form was probably not Mr. Hutton's. RP 130-133. The trial court reviewed the court file and compared signatures purported to be Mr. Hutton's and then reviewed the original Consent to Search form and determined that the signature was Mr. Hutton's, despite the testimony of Ms. McFarland. RP 188. The State did not call its own expert in handwriting analysis.

Mr. Hutton was convicted by a jury. CP 26-29. Verdict Form A indicates that the jury found Mr. Hutton guilty of unlawful manufacturing of a controlled substance. CP-26. The verdict form does not specify what controlled substance he was manufacturing. CP-26. He timely appealed. CP-34.

D. ARGUMENT

1. The trial court abused its discretion when it found that the signature on the Consent to Search form was Mr. Hutton's?

The admissibility of evidence rests within the sound discretion of the trial court and will not be disturbed unless no reasonable person would adopt the trial court's view. State v. Atsbeha, 142 Wash.2d 904, 913-14, 16 P.3d 626 (2001). A criminal defendant has a constitutional right to present a defense. Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Defendants have the right to present a defense, but do not have the right to introduce evidence that is irrelevant or otherwise inadmissible. State v. Rehak, 67 Wash.App. 157, 162, 834 P.2d 651 (1992). A trial court may, in its discretion, reject evidence where the evidence is vague, or where the evidence is merely argumentative and speculative. State v. Knapp, 14 Wash.App. 101, 108, 540 P.2d 898 (1975).

Admissibility of expert testimony is governed by ER 702. ER 702 requires that (1) the witness is qualified as an expert and (2) the testimony would be helpful to the trier of fact. State v. Farr-Lenzini, 93 Wash.App. 453, 461, 970 P.2d 313 (1999). Expert testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. Id.

In State v. Moses, 129 Wn.App. 718, 119 P.3d 906, (Div. I 2005), Moses argued the trial court's exclusion of expert testimony from Dr.

Lawrence Wilson violated his right to present a defense. Dr. Wilson would have testified regarding the nature of Jennifer's, the alleged victim, depression, the ability of a person who was severely depressed to appear normal to friends and co-workers, and the likelihood that someone with Jennifer's degree of depression together with other risk factors might commit suicide. State v. Moses, 129 Wn.App. 718, ___, 119 P.3d 906, 914 (Div. I 2005)

In State v. Thomas, Division One affirmed the trial court's decision to exclude expert testimony offered to support the defense of diminished capacity. 123 Wash.App. 771, 781, 98 P.3d 1258 (2004). In Thomas, the defense expert would have testified regarding the defendant's history of alcohol use, and that it was possible that the defendant suffered a blackout on the night of the assault. The court concluded that the court did not abuse its discretion in excluding the testimony because the expert could not testify that the defendant had consumed enough alcohol that night to suffer a blackout, or that a mental disorder impaired the defendant's ability to form the requisite intent. Thomas, 123 Wash.App. at 781, 98 P.3d 1258.

In Moses, Dr. Wilson was retained to form an opinion based only on the records provided by Moses. Other medical providers, who treated Jennifer, testified about her depression, her suicidal ideation, and her alcohol and drug addiction. The jury heard testimony from four medical providers. The Valley General doctor testified that Jennifer had severe

depression in March 2002. The chemical dependency counselor described Jennifer's depression, suicidal ideation and cocaine binges. Jennifer's Hall Health Center counselor from January to March 2002, testified about Jennifer's depression, that depression is a serious, life-threatening illness and that improvement is unlikely if a person uses drugs and alcohol. Because the treatment provider, who treated Jennifer's chemical dependency between April and August of 2002, had died, the records custodian read the provider's notes to the jury. These notes reflected Jennifer's past suicidal ideation and her major and recurrent depression. During cross-examination, Moses also elicited testimony from the medical examiner that alcohol, drugs and access to firearms present an increased risk of suicide. Finally, the trial court admitted all references from Jennifer's medical records to suicidal ideation and depression for the entire year and all references from her online journal for the four-month period before her death. Moses, 129 Wn.App. at ___, 119 P.3d at 914.

The trial court ruled the only additional expert testimony Dr. Wilson could provide was that in his opinion that Jennifer had a 0.25 percent increased chance of committing suicide during the six months between diagnosis of depression and time of her death. Dr. Wilson could not testify about whether Jennifer was suicidal the night of her death--"I would not at this point state that, to a reasonable degree of medical certainty, I think she committed suicide." Based on the defense offer of proof, the court concluded that Dr. Wilson's testimony was not helpful to

the trier of fact under ER 702. We conclude the court did not abuse its discretion in excluding Dr. Wilson's testimony. In Moses, as in Thomas, the expert witness, Dr. Wilson, could not direct relevancy of the proffered expert testimony given that Dr. Wilson could not testify that Jennifer was suicidal on the night she died, but only that she was in the category of people for whom the risk of suicide is marginally greater than the average person. Moses was able to elicit the same type of information regarding depression and suicide from other witnesses including Jennifer's treatment providers and the medical examiner. State v. Moses, 129 Wn.App. 718, ___, 119 P.3d 906, 914 (Div. I 2005).

- i. The trial court said that the handwriting comparison was a matter for an expert witness. RP 83.

Admissibility of expert testimony is governed by ER 702. ER 702 requires that (1) the witness is qualified as an expert and (2) the testimony would be helpful to the trier of fact. State v. Farr-Lenzini, 93 Wash.App. 453, 461, 970 P.2d 313 (1999). Expert testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. Id.

In the current case, the trial court stated that handwriting comparison was a matter for an expert. RP 83. This concession admits that the matter is technical and not a matter within the common knowledge of either the trial court or a jury. It is a subject matter that concerns a matter that is beyond the common knowledge of the average layperson. The trial court gave no indication that it had knowledge beyond a common layperson in matters of handwriting analysis.

- ii. The defense's handwriting expert found that the signature on the Consent to Search form was probably not Mr. Hutton's. RP 130, 133.

After examining approximately fifteen (15) samples of signatures that were admitted by Mr. Hutton to be his, Ms. McFarland, the handwriting expert, rendered an opinion that the signature on the Consent to Search form was probably not Mr. Hutton's. RP 130, 133.

- iii. The State did not call an expert witness to rebut the defense's expert witness.

The State did not call an expert witness to rebut the opinion of Ms. McFarland.

- iv. The trial court then reviewed the court file and compared the signature's that allegedly belonged to Mr. Hutton, and found that the signature was Mr. Hutton's. RP 188.

Rather than accept the opinion of Ms. McFarland that the signature on the Consent to Search form was not Mr. Hutton's, the trial court reviewed the court file for signatures that were reported to be Mr. Hutton's. apparently without the aid of magnification or other mechanical assistance, the trial court opined that the signatures looked like the same person signed them. RP 188. The trial court did not confirm that the signatures were, in fact, Mr. Hutton's. The trial court did not give any indications that it had knowledge or skill other than what was learned through the course of examination in rendering opinions regarding handwriting analysis. It is an abuse of discretion for a court to render an opinion contrary to the evidence presented before it.

2. The trial court abused its discretion when it failed to allow the handwriting expert to testify at trial regarding the signature on the alleged consent form.

Defendants have the right to present a defense, but do not have the right to introduce evidence that is irrelevant or otherwise inadmissible. State v. Rehak, 67 Wash.App. 157, 162, 834 P.2d 651 (1992). A trial court may, in its discretion, reject evidence where the evidence is vague, or where the evidence is merely argumentative and speculative. State v. Knapp, 14 Wash.App. 101, 108, 540 P.2d 898 (1975).

- i. An expert in handwriting analysis is necessary to assist the jury in understanding the evidence related to whether the signature on the alleged consent form is, in fact, the defendant's.

It is clear from the trial court's initial comment that handwriting analysis is a matter for expert opinion. This implicitly acknowledges that if the trial court needs to rely on expert opinion to understand handwriting analysis, the jury likewise would need such assistance. It seems clear that if the jury is to hear evidence related to the handwriting and signature on the Consent to Search form, an expert on handwriting analysis will assist the trier of fact in understanding the evidence. ER 702. Therefore, the question is whether the evidence is relevant or otherwise not admissible. Rehak, 67 Wash.App. at 162, 834 P.2d at __.

- ii. Whether the Consent to Search form was forged or otherwise unreliable reflects on the credibility and bias of Officer Stephen's, and is, therefore, pertinent and material to Mr. Hutton's defense.

"Bias" is a general term incorporating various factors that can cause a witness to fabricate or slant his testimony, such as prejudice, self-interest, or

ulterior motives. See *Davis v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974); 5A Teglund, *Evidence Law and Practice*, ' 225 (3d Ed. 1989). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *U.S. v. Abel*, 469 U.S. 45, 52, 83 L. Ed. 2d 450, 105 S. Ct. 465 (1984).

The right of a criminal defendant to cross-examine witnesses against him as to their bias is guaranteed by the Sixth Amendment to the United States Constitution. *Davis*, 415 U.S. at 315-316. "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination." *Id.* at 316-17. *State v. Roberts*, 25 Wn. App. 830, 611 P.2d 1297 (1980); *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319 (1971) ("It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross examination of prosecuting witnesses to show motive or credibility.") The government's failure to disclose a witness' bias can violate the defendant's right to due process. *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 104, 92 S. Ct. 763 (1972) (reversal for failure to reveal informal agreement not to prosecute witness); *Bagley v. United States*, 473 U.S. 667 (1985) (reversal for failure to disclose evidence that witnesses were paid \$3000 for their time spent investigating the case).

Unlike other, less favored, forms of impeachment, bias may be proven by extrinsic evidence; the cross examiner is not required to "take the answer of the witness." *U.S. v. Abel*, 469 U.S. at 52; *State v. Jones*, 25 Wn. App. 746, 750-

51, 610 P.2d 934 (1980); *State v. Wilder*, 4 Wn. App. at 855-56. Bias may be proven by testimony concerning collateral incidents. *State v. Jones*, 25 Wn. App. at 751.

A party has the right to cross-examine a witness to reveal a financial interest in the outcome of the litigation. *See Delaware v. Van Arsdall*, 475 U.S. 673 (1986). In a criminal case, the right to cross-examine for bias is an outgrowth of the Sixth Amendment right to confrontation. *See State v. McDaniel*, 37 Wn.App. 768, 772-773 (Div. I – 1984). To effectuate this right, the court should allow the defense to cross-examine prosecution witnesses to reveal any possible bias. *State v. Wilder*, 4 Wn.App. 850, 855 (Div. II – 1971) (“It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility.”).

The fact that a witness may have a financial interest in the outcome of a case is a proper subject of cross-examination for bias. *See, e.g., State v. Johnson*, 90 Wn.App. 54, 69 (Div. II – 1998) (proper to impeach witness with evidence he would receive money if defendant were convicted). Thus, Washington courts have repeatedly held that “[e]vidence that an alleged victim intends to pursue an action for damages is a proper subject of impeachment.” *State v. Buss*, 76 Wn.App. 780, 787 (Div. I – 1995). See also *State v. Guizzotti*, 60 Wn.App. 289, 293 (Div. II – 1991); *State v. Smits*, 58 Wn.App. 333, 339-340 (Div. I – 1990). The fact that the alleged victim has not actually filed a lawsuit “should be given very little weight. It is the fact that a victim intends to file a lawsuit which is

relevant. Victims who intend to bring a parallel civil action have an interest in first establishing fault in the criminal proceeding." *State v. Buss*, 76 Wn.App. at 788 n.3 (citing *State v. Whyde*, 30 Wn.App. 162, 166 (Div. I – 1981)).

"Bias is a permissible and established basis of impeachment under the Rules of Evidence." *US v Abel*, 469 US 45 (1984). Unanimous decision on ER 607 and 611(b). "Cross-examination of a witness to elicit facts which tend to show bias, prejudice or interest is generally a matter of right..." *State v. Roberts*, 25 Wn.App 830, 834, 611 P.2d 1297, 1300 (1980). The bias does not have to be connected with your defendant. *See US v Rios Ruiz*, 579 F.2d 670, 673 (1st Cir. 1978). "...critical ...that criminal record created a likelihood that she would be biased against appellant." *State v. Briggs*, 55 Wn.App. 44, 67 (1989).

In the current case, Officer Stephens' credibility is at issue before the jury. The trial court did not address potential issues related to credibility or bias as a basis to challenge Officer Stephens' testimony. The trial court simply said that the issue was already decided. By precluding the defense from calling Ms. McFarland as a witness, the trial court violated Mr. Hutton's right to present a defense and precluded Mr. Hutton from impeaching Officer Stephens regarding the suspect signature. See generally, *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998).

- iii. The trial court abused its discretion when it failed to allow the defense to call its handwriting expert to testify that the signature on the Consent to Search form was probably not Mr. Hutton's.

The evidence, even if not directly related to the specific charges, are very significant with regard to credibility and impeachment of the primary officer in this case. It was an abuse of the trial court's discretion to exclude evidence that bears directly on the credibility of one of the State's primary witnesses. When a witness such as a handwriting expert is excluded from testifying, it plays a role in how the defense presents its case. A primary piece of impeachment evidence was excluded, which negatively affects the ability of the defense to put on its case. Consequently, Mr. Hutton was precluded from presenting to the jury the case that he wanted to present. See Ellis, 136 Wn.2d at 498, 963 P.2d at 843.

3. The trial court erred where it sentenced Mr. Hutton to a sentence within the standard range of 100 – 120 months for manufacturing methamphetamine, where the judge, not the jury found that Mr. Hutton was manufacturing methamphetamine. CP-26, CP-32.

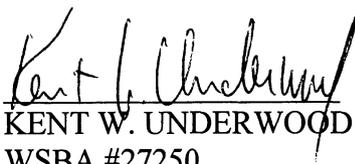
Verdict Form A states that “[w]e, the jury, find the defendant guilty of the crime of unlawful manufacturing of a controlled substance as charged in count one. CP-26. The jury did not state what controlled substance was manufactured. CP-26. Where the controlled substance is not specifically indicated RCW 69.50.401(iii) provides that one who manufactures “any other controlled substance classified in schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years. The verdict form did not indicate an enumerated controlled substance that carries a maximum sentence of more than five years. Here, as in State v. Evans, 129 Wn.App. 211, 118 P.3d 419 (2005), no controlled substance was mentioned in the verdict. The jury did not determine which controlled substance was manufactured. Consequently, the

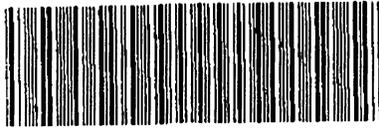
maximum sentence that the trial court may sentence Mr. Hutton to is five (5) years. Evans, 129 Wn.App. at 211, 118 P.3d at 419.

V. CONCLUSION

For the reasons stated above, the court should remand this case for a new trial. In the alternative, the court should remand for resentencing.

RESPECTFULLY SUBMITTED this 15th day of June,
2006.


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03-1-04822-6 22811090 VRD 02-24-05



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-04822-6

vs.

BRIAN PHILLIP HUTTON

VERDICT FORM A

Defendant.

We, the jury, find the defendant GUILTY (Not Guilty or Guilty) of the crime of UNLAWFUL MANUFACTURING OF A CONTROLLED SUBSTANCE as charged in Count V.

[Signature]
PRESIDING JUROR

1 A That's right.

2 Q Okay.

3 A No, I don't believe so.

4 Q Have you ever worked in the forgery unit?

5 A No, I have not.

6 Q So you wouldn't know then necessarily it would be hard
7 to prove a forgery if somebody forged -- for example,
8 it's pretty easy to prove if it's not someone's
9 signature; correct? For example, it's not Mr. Hutton's
10 signature. But isn't it hard to prove whose signature
11 it is?

12 MR. ERICKSEN: Objection, Your Honor. I don't
13 think -- I think he said he doesn't have any personal
14 knowledge on that.

15 THE COURT: I'd say at this point that is
16 speculation. He said he wasn't involved in it, so I
17 think it calls for some expert testimony.

18 MR. OELRICH: I don't have anything further at
19 this time.

20 THE COURT: Okay. Mr. Berneburg?

21 MR. BERNEBURG: Thank you.

22 (WHEREUPON, Defendants' Exhibit
23 No. 2 was marked for
identification.)

24 MR. BERNEBURG: Permission to approach, Your
25 Honor.

1 times, and then there's an oral exam.

2 Q Do you have to study for this test or how do you prepare
3 for these exams?

4 A There is a suggested study, suggested text to study.

5 Q How many years of training have you had? Or is it
6 years, months?

7 A About two years.

8 Q Have you testified in court?

9 A Many times.

10 Q Have you been qualified through the courts as an expert
11 witness?

12 A Yes.

13 MR. OELRICH: At this time, Your Honor, I
14 would like to offer the witness as an expert in the
15 field of document examination.

16 MR. ERICKSEN: No objection.

17 THE COURT: All right. The Court will find
18 that she's an expert in the field of document
19 examination.

20 Q Have you had an opportunity to review a document in this
21 case?

22 A Yes.

23 Q What generally did you review?

24 A I examined the original document, consent to search, and
25 then 12 documents that the genuine -- that were

1 why it's kind of fuzzy, because of the quality of the
2 fax that I had to work with, to start out with.

3 Then this is two of the 12 exemplar signatures that
4 I could use to compare with the questioned signature. I
5 then -- this one here is from a scheduling conference
6 order, and I've got the date on there. And then this is
7 -- which is a carbon copy, and then this is an original
8 signature from an omnibus hearing, and -- although I
9 compared it in a total to 12 genuine signatures.

10 So it's obvious that this is not a genuine
11 signature, that the person who did write this was
12 attempting to imitate the genuine signature of Brian
13 Hutton because -- there's some overall similarities in
14 the questioned signature.

15 But when a person tries to imitate a genuine
16 signature they often have to stop and start. When a
17 person breaks their own signature, it's just an
18 automatic process, you just whip it out, and people
19 don't stop and hesitate. But in this signature there's
20 three points where the person stopped and started, which
21 makes it suspicious.

22 Right here, they kind of lifted and then set down.
23 Here at the base of this "H" they kind of lifted and
24 then set down. And then here, right here, the pen was
25 lifted and then set down again.

1 exemplar is wide open at the bottom. And it's missing a
2 letter here. This is i-a-n, there's no "r" here.

3 And so with all those differences I concluded it's
4 probably not a genuine signature.

5 Q You say probably not. Can you ever guarantee that it's
6 -- there's a situation where you can say I know for sure
7 this is not a genuine signature?

8 A Yes.

9 Q What would that have to do, be able to do something like
10 that?

11 A I think I would want to see more tremors -- there's no
12 real tremor in here. It's reasonably fluent.

13 Q Okay.

14 A Whoever did it did a pretty good job.

15 Q So you said it's just probably not?

16 A Probably not a genuine signature.

17 MR. OELRICH: I don't have anything further at
18 this time.

19 THE COURT: Cross-examination, Mr. Ericksen.

20 MR. ERICKSEN: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. ERICKSEN:

23 Q Good afternoon, Ms. McFarland.

24 A Afternoon.

25 Q Mr. Oelrich was the one who hired you in this case;

1 decided.

2 THE COURT: Counsel.

3 MR. OELRICH: With regard to that, that's a
4 key element of the defense, and we argued whether it's
5 admissible this morning, but I think the jury needs to
6 hear everything that transpired that day. Look at the
7 big picture. There's some question of the acts of the
8 officers that took place on October 13th, 2003, whether
9 there was a valid consent, and I think Your Honor has
10 ruled on its admissibility but as far as -- and that's
11 where we had the bush. And now the jury's going to hear
12 about it. We need to argue about whether that consent
13 was actually validated.

14 THE COURT: Well, the charge is manufacturing
15 of methamphetamine and I will grant the State's
16 motion. I don't think at this point that the
17 authenticity or not of the consent is relevant to the
18 jury's decision on whether or not these gentlemen are
19 guilty of manufacturing methamphetamine.

20 As their prior convictions, that's something of a
21 red herring, so I don't think we need to present that to
22 the jury.

23 MR. ERICKSEN: Your Honor, the State would
24 move to admit evidence of the existence of Mr. Hutton's
25 warrants which provide part of the basis for Officer

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STATE OF WASHINGTON

BY _____
ATTORNEY

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**IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

NO. 33077-6-II

Respondent,

CERTIFICATE OF SERVICE

v.

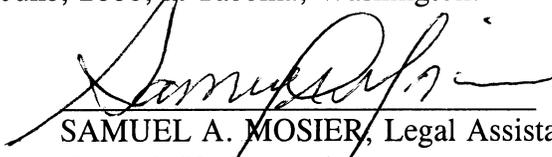
BRIAN PHILLIP HUTTON,

Petitioner.

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the following statement is true and correct: On June 15th, 2006, declarant served a copy of the following documents via ABC Legal Messenger to the Prosecuting Attorneys Office, Pierce County, and to Brian Phillip Hutton at DOC #840170, McNeil Island Correction Center, A306-1, P.O. Box 881000, Steilacoom, WA 98388-1000 via regular mail.

SUPPLEMENT TO OPENING BRIEF OF APPELLANT

DATED this 15th day of June, 2006, at Tacoma, Washington.



SAMUEL A. MOSIER, Legal Assistant for,
Kent W. Underwood
WSBA #27250
Attorney for the Petitioner

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