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COURT OF APPEALS

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STATE OF WASHINGTON

BY  COUNTY

NO 34422-0-II.
Cowlitz County No 05-8-000438-2.

STATE OF WASHINGTON,

Appellant,

vs.

ERNESTO HERNANDEZ-PICHARDO

Respondent.

BRIEF OF RESPONDENT

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P.M. 11-27-06

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A. ANSWER TO STATE'S ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State is incorrect in its assertion that the trial court failed to recognize its inherent contempt power. The court does recognize its authority to exercise its inherent contempt power. However, pursuant to the authority of this Court's opinion in *State v. A.L.H.*, 116 Wn.App. 158, 64 P.3d 1262 (2003), the trial court preliminarily limited the length of any such contempt sanction to seven days' incarceration.

B. STATEMENT OF THE CASE

On December 8, 2005, the Cowlitz County prosecuting attorney filed an information charging respondent Ernesto Hernandez-Pichardo, DOB: 5/1/88, with a single count of criminal truancy.

The defendant in the County of Cowlitz, State of Washington, on or about the 28th, 29th, and 30th of November and/or December 1st and 2nd, 2005 did intentionally disobey a lawful order of this court, to wit: the Order to Attend School issued in Cowlitz County Juvenile Court, Cause number 05-7-00021-9, on November 22, 2004, by not attending school as required by the aforementioned order; contrary to RCW 7.21.010(1)(b), RCW 7.21.040 and against the peace and dignity of the state of Washington. The state requests a punitive sanction of up to one year in detention and/o a fine of up to \$5,000.

CP 1. The prosecutor filed a similar order against Justin Johnson. Both Johnson and Hernandez-Pichardo were represented by the same defense

counsel and were consequently heard at the same time.¹ 1RP² 3-21 & 2RP 3-8.

Prior to the first hearing, the state filed a motion and memorandum asking the trial court to invoke its inherent contempt power against both boys and to allow the state to proceed with the “criminal informations filed in these cases.” CP 2-8. The state’s memorandum gave an account of both boys’ failure to abide the trial court’s November 22, 2004, Order to Attend School. CP 3-8. The court and the parties discussed the state’s memorandum and scope of the trial court’s authority on truancy filings at a December 13 hearing. 1RP 11-14. The discussion began with the defense objecting to the criminal informations. 1RP 12. The state and defense counsel agreed that the allowable penalties for violations of truancy contempt orders were unclear. 1RP 11-14. Both agreed that the maximum penalty for a civil violation was seven days; the disagreement was over the allowable penalty for a criminal violation in light of the state’s criminal information. 1RP 12-14. The court called for defense briefing and set the matter over. 1RP 14-15.

Defense counsel’s reply brief focused on the rehabilitative goal of the Juvenile Justice Act of 1977 and reminded the court of the statutory

¹ This Court also consolidated the cases for appellate purposes.

² “1RP” refers to the verbatim report of the December 13, 2005, hearing. “2RP” refers to the December 20, 2005, report of proceedings.

authority allowing up to a seven-day penalty for truancy civil contempt.³ CP 9-13. The brief also attached the Governor's Juvenile Justice Advisory Committee Request for Proposals. The proposals sought were those that would aid Washington State in complying with federal standards which prohibit juvenile status offenders – such as truant children – from being confined in secure detention facilities. CP 14.

The court took the issue up again on December 20. 2RP. In denying the state's request to file the criminal truancy information, the court ruled that it was bound by this court's precedence in *State v. A.L.H.*, 116 Wn. App. 158, 64 P.3d 1262 (2003). 2RP 4-5. In *A.L.H.*, this court very specifically held that, "But when a juvenile subject to an ARY order violates a condition of **that** order, the State is expressly limited by statute to seek remedial sanctions under RCW 7.21.030(2)." *A.L.H.* at 164. RCW 7.21.030(2) applies to violations of truancy orders under RCW 28A.225.090. Following the precedence of *A.L.H.*, the court dismissed the state's efforts to file a criminal contempt charge. 2RP 4. The trial court also noted however, that both Respondents' non-compliance with the truancy order made seven days an inadequate penalty and that he would exercise greater authority if he thought he could. 2RP 8.

³ See RCW 7.21.030

The state filed a motion for reconsideration in light of Divisions III's subsequently issued opinion in *In re the Dependency of A.K.*, 130 Wn. App. 862, 125 P.3d 220 (2005). In *A.K.*, Division III held trial courts have inherent contempt power to exceed the seven-day detention statutorily allowed for status offenses. *A.K.* at 866. In a February 1 written denial of the state's reconsideration motion, the court noted it still found *A.L.H.*, 116 Wn. App. 158, binding precedence for Division II trial courts. CP 19. The court did, however, modify its earlier oral ruling (which was, unfortunately, never memorialized by the state in findings of fact and conclusions of law) and held that the State was free to immediately re-file its information charging criminal contempt of the truancy order. CP 19. The court merely advised the parties that should the State re-file its criminal information, and should the court hypothetically find Johnson and/or Hernandez-Pichardo in contempt, then it would only consider a remedial remedy and not a punitive remedy: "My previous oral ruling is modified to allow the State to file a criminal contempt, but the remedy, sanction, is limited to seven days in detention." CP 19.

The state filed its notice of appeal on February 16. The notice of appeal was not designated as a clerk's paper. The filing did not include an order the state was appealing from. The notice of appeal references a

February 14, 2006, decision. A review of the court file reveals nothing filed on February 14, 2006.

C. ARGUMENT

I. THE STATE'S APPEAL SHOULD BE DENIED BECAUSE (1) THE STATE HAS NOT APPEALED FROM A COURT ORDER; (2) THE APPEAL IS NOT RIPE BECAUSE THE TRIAL COURT GRANTED THE STATE'S REQUEST TO FILE A CRIMINAL TRUANCY CONTEMPT INFORMATION, BUT THE STATE FAILED TO DO SO; (3) THIS CASE IS MOOT AS IT PERTAINS TO MR. HERNANDEZ-PICHARDO AND SHOULD BE DISMISSED ON THAT BASIS; AND (4) THE TRIAL COURT CORRECTLY FOLLOWED THIS COURT'S PRECEDENT IN HOLDING THAT SEVEN DAYS IS THE MAXIMUM PENALTY ALLOWED FOR VIOLATION OF A REMEDIAL OR PUNITIVE TRUANCY ORDER.

(1) The lack of an Order from which the State is appealing warrants dismissal of the appeal.

Preliminarily, it should be noted that pursuant to RAP 5.3, Content of Notice – Filing, the appellant must designate the decision which the party wants reviewed. Moreover, the appellant should attach a copy to the notice of appeal a signed order from which the appeal is taken. RAP 5.3(a). In this appeal, there is no court order attached to the notice of appeal and the state refers to a seemingly nonexistent trial court decision filed on February 14th, 2006. Without the required specificity as to what is

being appealed, an answer is difficult. The absence of the February 14th, 2006 order warrants dismissal of this appeal.

(2) This case is not appealable because the trial court granted the State's requested relief.

This case is not appealable because it is not ripe. Assuming this Court decides that the notice of appeal is proper under R.A.P. 5.3 (a), the only order it appears the State could possibly be appealing is the court's denial of the State's Motion for Reconsideration filed on February 1st, 2006. CP 19. This order is not appealable under R.A.P. 2.2. This order did not terminate the State's case. It was not a final judgment or disposition. It was, viewed in the light most favorable to the State, a revision of the trial court's earlier decision and an invitation to proceed. The court explicitly invited the State to immediately re-file its information charging criminal contempt. It merely stated the court's future intention, assuming the contempt was proven beyond a reasonable doubt (as it must be in criminal contempt proceedings), to impose only a remedial, as opposed to a punitive, sanction. To make this an appealable issue, the State would have had to file its criminal information, as the trial encouraged it to do in its February 1st order and then, assuming contempt was found, ask for the punitive remedy it wanted and subsequently appeal the trial court's refusal to consider that remedy.

(3) This appeal is moot as it pertains to Mr. Hernandez-Pichardo and should be dismissed.

This appeal should be dismissed as it pertains to Mr. Hernandez-Pichardo because he turned eighteen on May 1st, 2006 and this appeal is now moot. Although numerous cases addressing the issue of contempt in juvenile proceedings have involved mootness, those cases typically dealt with mootness due to the juvenile having already served the sanction that was imposed or to the subsequent dismissal of the underlying CHINS/ARY/dependency/truancy order. See *Interest of Rebecca K.*, 101 Wn.App. 309, 2 P.3d 501 (2000); *In re Interest of M.B.*, 101 Wn.App. 425, 3 P.3d 780 (2000). Here, the juvenile court lacks jurisdiction over Mr. Hernandez-Pichardo because he is eighteen. See RCW 13.04.011 (2). In this case, no order extending jurisdiction beyond Mr. Hernandez-Pichardo's eighteenth birthday has been entered in the Cowlitz County juvenile court, nor would such an order be authorized under any provision of RCW 13.40.300. Further, because co-Respondent Johnson is not over the age of eighteen any substantial public interest served by this appeal can be addressed by this Court in Mr. Johnson's case alone. This appeal, as it pertains to Mr. Hernandez-Pichardo, should be dismissed for each or any of the three bases outlined above.

(4) The trial court's reliance on this Court's precedent in *State v. A.L.H.* was appropriate.

In *A.L.H.*, this Court, while acknowledging the inherent contempt power of the trial courts, held that the sanction for violations of an ARY order was limited to seven days' incarceration pursuant to a civil contempt. *A.L.H.* at 160, nt. 3 and 163-64. The Court also acknowledged broader contempt authority if the contemptuous behavior was based on some other basis than the status offense order. *A.L.H.* at 163-64. The trial court interpreted this holding to limit the allowable contempt sanction in truancy cases (pursuant to RCW 13.32A.250 (2)) to seven days' incarceration.

While Division III's opinion in *State v. A.K.*, 130 Wn.App. 862, 125 P.3d 220 (2005) suggests that trial courts have greater inherent authority to impose longer sanctions in rare instances on status offenses, Division II has not issued an opinion specifically endorsing this approach. In fact, the State Supreme Court has accepted review of *A.K.*, characterizing the issue on its website as follows:

“Whether a juvenile court has inherent power to incarcerate a juvenile for contempt without an opportunity to purge the contempt and without affording the juvenile the safeguards associated with criminal trials.”

With *A.K.*'s holding in question, it was appropriate for the trial court in this case to limit contempt sanctions-remedial or punitive-to seven days.

D. CONCLUSION

This appeal should be dismissed for lack of an appealable order, because it is not ripe, and because the case is moot as it pertains to Mr. Hernandez-Pichardo. Alternatively, the Court should stay an opinion in this case pending the State Supreme Court's decision in *State v. A.K.*

RESPECTFULLY SUBMITTED this 27th day of November, 2006.



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APPENDIX

1. RCW 13.04.011 Definitions.

For purposes of this title:

(1) "Adjudication" has the same meaning as "conviction" in RCW 9.94A.030, and the terms must be construed identically and used interchangeably;

(2) Except as specifically provided in RCW 13.40.020 and chapter 13.24 RCW, "juvenile," "youth," and "child" mean any individual who is under the chronological age of eighteen years;

(3) "Juvenile offender" and "juvenile offense" have the meaning ascribed in RCW 13.40.020;

(4) "Court" when used without further qualification means the juvenile court judge(s) or commissioner(s);

(5) "Parent" or "parents," except as used in chapter 13.34 RCW, means that parent or parents who have the right of legal custody of the child.

"Parent" or "parents" as used in chapter 13.34 RCW, means the biological or adoptive parents of a child unless the legal rights of that person have been terminated by judicial proceedings;

(6) "Custodian" means that person who has the legal right to custody of the child.

2. RCW 13.32A.250 Failure to comply with order as civil contempt - Motion - Penalties.

(1) In all child in need of services proceedings and at-risk youth proceedings, the court shall verbally notify the parents and the child of the possibility of a finding of contempt for failure to comply with the terms of a court order entered pursuant to this chapter. Except as otherwise provided in this section, the court shall treat the parents and the child equally for the purposes of applying contempt of court processes and penalties under this section.

(2) Failure by a party to comply with an order entered under this chapter is a civil contempt of court as provided in RCW 7.21.030(2)(e), subject to the limitations of subsection (3) of this section.

(3) The court may impose remedial sanctions including a fine of up to one hundred dollars and confinement for up to seven days, or both for contempt of court under this section.

(4) A child placed in confinement for contempt under this section shall be placed in confinement only in a secure juvenile detention facility operated by or pursuant to a contract with a county.

(5) A motion for contempt may be made by a parent, a child, juvenile court personnel, or by any public agency, organization, or person having custody of the child under a court order adopted pursuant to this chapter.

(6) Whenever the court finds probable cause to believe, based upon consideration of a motion for contempt and the information set forth in a supporting declaration, that a child has violated a placement order entered under this chapter, the court may issue an order directing law enforcement to pick up and take the child to detention. The order may be entered ex parte without prior notice to the child or other parties. Following the child's admission to detention, a detention review hearing must be held in accordance with RCW **13.32A.065**.

3. RCW 13.40.300 Commitment of juvenile beyond age twenty-one prohibited – Jurisdiction of juvenile court after juvenile's eighteenth birthday.

(1) In no case may a juvenile offender be committed by the juvenile court to the department of social and health services for placement in a juvenile correctional institution beyond the juvenile offender's twenty-first birthday. A juvenile may be under the jurisdiction of the juvenile court or the authority of the department of social and health services beyond the juvenile's eighteenth birthday only if prior to the juvenile's eighteenth birthday:

(a) Proceedings are pending seeking the adjudication of a juvenile offense and the court by written order setting forth its reasons extends jurisdiction of juvenile court over the juvenile beyond his or her eighteenth birthday;

(b) The juvenile has been found guilty after a fact finding or after a plea of guilty and an automatic extension is necessary to allow for the imposition of disposition;

(c) Disposition has been held and an automatic extension is necessary to allow for the execution and enforcement of the court's order of disposition. If an order of disposition imposes commitment to the department, then jurisdiction is automatically extended to include a period of up to twelve months of parole, in no case extending beyond the offender's twenty-first birthday; or

(d) While proceedings are pending in a case in which jurisdiction has been transferred to the adult criminal court pursuant to RCW **13.04.030**, the juvenile turns eighteen years of age and is subsequently found not guilty of the charge for which he or she was transferred, or is convicted in the adult criminal court of a lesser included offense, and an automatic extension is necessary to impose the disposition as required by RCW **13.04.030** (1) (e) (v) (E).

(2) If the juvenile court previously has extended jurisdiction beyond the juvenile offender's eighteenth birthday and that period of extension has not expired, the court may further extend jurisdiction by written order setting forth its reasons.

(3) In no event may the juvenile court have authority to extend jurisdiction over any juvenile offender beyond the juvenile offender's twenty-first birthday except for the purpose of enforcing an order of restitution or penalty assessment.

(4) Notwithstanding any extension of jurisdiction over a person pursuant to this section, the juvenile court has no jurisdiction over any offenses alleged to have been committed by a person eighteen years of age or older.

4. RCW 28A.225.090 Court orders – Penalties – Parents' defense.

(1) A court may order a child subject to a petition under RCW **28A.225.035** to do one or more of the following:

(a) Attend the child's current school, and set forth minimum attendance requirements, including suspensions;

(b) If there is space available and the program can provide educational services appropriate for the child, order the child to attend another public school, an alternative education program, center, a skill center, dropout prevention program, or another public educational program;

(c) Attend a private nonsectarian school or program including an

education center. Before ordering a child to attend an approved or certified private nonsectarian school or program, the court shall: (i) Consider the public and private programs available; (ii) find that placement is in the best interest of the child; and (iii) find that the private school or program is willing to accept the child and will not charge any fees in addition to those established by contract with the student's school district. If the court orders the child to enroll in a private school or program, the child's school district shall contract with the school or program to provide educational services for the child. The school district shall not be required to contract for a weekly rate that exceeds the state general apportionment dollars calculated on a weekly basis generated by the child and received by the district. A school district shall not be required to enter into a contract that is longer than the remainder of the school year. A school district shall not be required to enter into or continue a contract if the child is no longer enrolled in the district;

(d) Be referred to a community truancy board, if available; or

(e) Submit to testing for the use of controlled substances or alcohol based on a determination that such testing is appropriate to the circumstances and behavior of the child and will facilitate the child's compliance with the mandatory attendance law and, if any test ordered under this subsection indicates the use of controlled substances or alcohol, order the minor to abstain from the unlawful consumption of controlled substances or alcohol and adhere to the recommendations of the drug assessment at no expense to the school.

(2) If the child fails to comply with the court order, the court may order the child to be subject to detention, as provided in RCW **7.21.030**(2)(e), or may impose alternatives to detention such as community restitution. Failure by a child to comply with an order issued under this subsection shall not be subject to detention for a period greater than that permitted pursuant to a civil contempt proceeding against a child under chapter **13.32A** RCW.

(3) Any parent violating any of the provisions of either RCW **28A.225.010**, **28A.225.015**, or **28A.225.080** shall be fined not more than twenty-five dollars for each day of unexcused absence from school. It shall be a defense for a parent charged with violating RCW **28A.225.010** to show that he or she exercised reasonable diligence in attempting to cause a child in his or her custody to attend school or that the child's school did not perform

its duties as required in RCW **28A.225.020**. The court may order the parent to provide community restitution instead of imposing a fine. Any fine imposed pursuant to this section may be suspended upon the condition that a parent charged with violating RCW **28A.225.010** shall participate with the school and the child in a supervised plan for the child's attendance at school or upon condition that the parent attend a conference or conferences scheduled by a school for the purpose of analyzing the causes of a child's absence.

(4) If a child continues to be truant after entering into a court-approved order with the truancy board under RCW **28A.225.035**, the juvenile court shall find the child in contempt, and the court may order the child to be subject to detention, as provided in RCW **7.21.030**(2)(e), or may impose alternatives to detention such as meaningful community restitution. Failure by a child to comply with an order issued under this subsection may not subject a child to detention for a period greater than that permitted under a civil contempt proceeding against a child under chapter **13.32A** RCW.

(5) Subsections (1), (2), and (4) of this section shall not apply to a six or seven year-old child required to attend public school under RCW **28A.225.015**.

5. RCW 7.21.030 Remedial sanctions – Payment for losses.

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW **7.21.050**, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW **7.21.010**(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the person to juvenile detention for a period of time not to exceed seven days.

6. RULE 2.2 DECISIONS OF THE SUPERIOR COURT WHICH MAY BE APPEALED

(a) **Generally.** Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) *Final Judgment.* The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

(2) [Reserved.]

(3) *Decision Determining Action.* Any written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action.

(4) *Order of Public Use and Necessity.* An order of public use and necessity in a condemnation case.

(5) *Juvenile Court Disposition*. The disposition decision following a finding of dependency by a juvenile court, or a disposition decision following a finding of guilt in a juvenile offense proceeding.

(6) *Deprivation of All Parental Rights*. A decision depriving a person of all parental rights with respect to a child.

(7) *Order of Incompetency*. A decision declaring an adult legally incompetent, or an order establishing a conservatorship or guardianship for an adult.

(8) *Order of Commitment*. A decision ordering commitment, entered after a sanity hearing or after a sexual predator hearing.

(9) *Order on Motion for New Trial or Amendment of Judgment*. An order granting or denying a motion for new trial or amendment of judgment.

(10) *Order on Motion for Vacation of Judgment*. An order granting or denying a motion to vacate a judgment.

(11) *Order on Motion for Arrest of Judgment*. An order arresting or denying arrest of a judgment in a criminal case.

(12) *Order Denying Motion to Vacate Order of Arrest of a Person*. An order denying a motion to vacate an order of arrest of a person in a civil case.

(13) *Final Order After Judgment*. Any final order made after judgment which affects a substantial right.

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) *Final Decision, Except Not Guilty*. A decision which in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information.

(2) *Pretrial Order Suppressing Evidence*. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) *Arrest or Vacation of Judgment*. An order arresting or vacating a judgment.

(4) *New Trial*. An order granting a new trial.

(5) *Disposition in Juvenile Offense Proceeding*. A disposition in a juvenile offense proceeding which is below the standard range of disposition for the offense or which the state or local government believes involves a miscalculation of the standard range.

(6) *Sentence in Criminal Case.* A sentence in a criminal case which is outside the standard range for the offense or which the state or local government believes involves a miscalculation of the standard range.

(c) Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, a party may appeal only if the review proceeding was a trial de novo and the final judgment is not a finding that a traffic infraction has been committed.

(d) Multiple Parties or Multiple Claims or Counts. In any case with multiple parties or multiple claims for relief, or in a criminal case with multiple counts, an appeal may be taken from a final judgment which does not dispose of all the claims or counts as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. The time for filing notice of appeal begins to run from the entry of the required findings. In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties.

7. RULE 5.3 CONTENT OF NOTICE – FILING

(a) Content of Notice of Appeal. A notice of appeal must (1) be titled a notice of appeal, (2) specify the party or parties seeking the review, (3) designate the decision or part of decision which the party wants reviewed, and (4) name the appellate court to which the review is taken.

The party filing the notice of appeal should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made, and, in a criminal case in which two or more defendants were joined for trial by order of the trial court, provide the names and superior court cause numbers of all codefendants.

(b) Content of Notice for Discretionary Review. A notice for discretionary review must comply in content and form with the requirements for a notice of appeal, except that it should be titled a notice for discretionary review.

A party seeking discretionary review of a decision of a court of

limited jurisdiction should include the name of the district or municipal court and the cause number for which review is sought.

(c) Identification of Parties, Counsel, and Address of Defendant in Criminal Case. The party seeking review should include on the notice of appeal the name and address of the attorney for each of the parties. In a criminal case the attorney for the defendant should also notify the appellate court clerk of the defendant's address, by placing this information on the notice. The attorney for a defendant in a criminal case must also keep the appellate court clerk advised of any changes in defendant's address during review.

(d) Multiple Parties Filing Notice. More than one party may join in filing a single notice of appeal or notice for discretionary review.

(e) Notices Directed to More Than One Case. If cases have been consolidated for trial, or have been tried together even though not consolidated for trial, separate notices for each case or a single notice for more than one case may be filed. A single notice for more than one case will be given the same effect as if a separate notice had been filed for each case. If cases have not been consolidated for trial or have not been tried together, separate notices must be filed.

(f) Defects in Form of Notice. The appellate court will disregard defects in the form of a notice of appeal or a notice for discretionary review if the notice clearly reflects an intent by a party to seek review.

(g) Notices Directed to More Than One Court. If a notice of appeal or a notice for discretionary review is filed which is directed to the Court of Appeals and a notice is filed in the same case which is directed to the Supreme Court, the case will be treated as if all notices were directed to the Supreme Court.

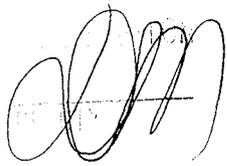
(h) Amendment of Notice Directed to Portion of Decision. The appellate court may, on its own initiative or on the motion of a party, permit an amendment of a notice to include additional parts of a decision in order to do justice. On discretionary review, the appellate court may, on its own initiative or on the motion of a party, permit an amendment of a notice to include acts of the trial court that are subsequent to the act for which discretionary review was first sought if the subsequent acts relate to the subject of the first review. If the amendment is permitted, the record should be supplemented as provided in rule 9.10. The appellate court may condition the amendment on appropriate terms, including payment of a compensatory award under rule 18.9.

(i) Notice by Fewer Than All Parties on a Side – Joinder. If there are multiple parties on a side of a case and fewer than all of the parties on that side of the case timely file a notice of appeal or notice for discretionary review, the appellate court will grant relief only (1) to a party who has timely filed a notice, (2) to a party who has been joined as provided in this section or (3) to a party if demanded by the necessities of the case. The appellate court will permit the joinder on review of a party who did not give notice only if the party's rights or duties are derived through the rights or duties of a party who timely filed a notice or if the party's rights or duties are dependent upon the appellate court determination of the rights or duties of a party who timely filed a notice.

(j) Assistance to Defendant in Criminal Case. The trial court clerk shall, if requested by a defendant in a criminal case in open court or in writing, supply a notice of appeal form, a notice for discretionary review form, or a form for a motion for order of indigency, and file the forms upon completion by the defendant.

FILED
COURT OF APPEALS

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BY 

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

STATE OF WASHINGTON,)	Court of Appeals No. 34422-0-II
)	Cowlitz County No. 05-8-00438-2
Appellant,)	
)	AFFIDAVIT OF MAILING
vs.)	
)	
ERNESTO PICHARDO-HERNANDEZ,)	
)	
Respondent.)	

ANNE M. CRUSER, being sworn on oath, states that on the 27th day of November 2006 affiant placed a properly stamped envelope in the mails of the United States directed to:

Susan I. Baur
Cowlitz County Prosecuting Attorney
312 S.W. 1st Avenue
Kelso, WA 98626

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

and that said envelope contained the following

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- (1) BRIEF OF RESPONDENT (2 COPIES TO MR. PONZOHA)
- (2) AFFIDAVIT OF MAILING

AND

Mr. Ernesto Hernandez-Pichardo
2769 Maryland Street
Longview, WA 98632

and that said envelope contained the following

- (1) BRIEF OF RESPONDENT
- (2) R.A.P. 10.10
- (3) AFFIDAVIT OF MAILING

Dated this 27th day of November 2006



ANNE M. CRUSER, WSBA #27944
Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: November 27th, 2006, Kalama, Washington

Signature: Anne M. Cruser