

NO. 34640-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH RAY ANGLIN

Appellant.

---

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

The Honorable James E. Warme, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering finding of fact XXII. CP 20 (Attached as Appendix).

2. Admission of an unreliable identification resulting from an impermissibly suggestive identification procedure violated appellant's right to due process.

Issue pertaining to assignments of error

Appellant was charged with residential burglary. The complaining witness testified that the police told her they had caught the man who broke into her house and then took her outside to identify him. Where the witness had only a brief opportunity to view the suspect and never saw his face, and where she provided an uncertain identification based solely on appellant's clothes, did admission of the unreliable identification violate appellant's right to due process?

B. STATEMENT OF THE CASE

1. Procedural History

On January 13, 2006, the Cowlitz County Prosecuting Attorney charged appellant Jeremiah Anglin with residential burglary, possession of methamphetamine, and obstructing a law enforcement officer. CP 1-2; RCW 9A.52.025; RCW 69.50.4013; RCW 9A.76.020(1)(a). Anglin pled

guilty to the possession charge and the state dismissed the obstructing charge. CP 14, 28. Anglin waived his right to a jury, and the case proceeded to a bench trial on the burglary charge before the Honorable James E. Warme. CP 7. The court found Anglin guilty and entered written findings of fact and conclusions of law. CP 16-22. The Honorable Jill Johanson imposed standard range sentences, and Anglin filed this timely appeal. CP 23, 30.

## 2. Substantive Facts

Shortly before 1:30 on the morning of January 12, 2006, Maria Montes-Gomez was awakened by a noise in her living room. Her children were asleep, and she did not expect her boyfriend home from work at that hour, so she went to the living room to investigate. 1RP<sup>1</sup> 45. She saw a man with a small flashlight looking around the living room, walking toward the kitchen. 1RP 46. Montes-Gomez immediately turned on a light and woke her son, who was sleeping on a sofa, telling him to call the police. 1RP 46-47. When she turned the light on, the man ran out the back door. 1RP 48.

Montes-Gomez testified that the man in her house was wearing a thick brown jacket and a baseball cap with the bill turned to the side. 1RP

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<sup>1</sup> The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—3/17/06; 2RP—3/31/06 (Judge Warme); 3RP—3/31/06 (Judge Johanson).

47, 55. He held his head down, and Montes-Gomez never saw his face or any distinguishing physical characteristics. 1RP 47, 59.

Montes-Gomez's son called the police at 1:29, and Longview Police Officers Jeremy Johnson and Kevin Sawyer arrived at 1:40. 1RP 27. They parked their patrol cars about a block away and approached the house on foot. 1RP 16. The officers noticed a man, later identified as Jeremiah Anglin, straddling a bicycle directly in front of Montes-Gomez's house. The man had a large backpack and wore a bulky brown coat, dark pants, and a dark colored hat. Johnson testified that Anglin was actually wearing a stocking cap with a ball cap over it, although his report mentioned only a single dark hat. 1RP 17, 28. Sawyer remembered a dark stocking cap, not a ball cap. 1RP 35, 41.

When Johnson identified himself as a police officer and shouted for Anglin to stay where he was, Anglin shined a flashlight at them and asked, "Why?" 2RP 18-19. Johnson did not answer but again told Anglin not to move. Anglin then rode off on the bicycle, and the officers followed on foot. They caught up with him when the backpack got caught in the bicycle's spokes and the bike flipped. 1RP 19. The officers identified Anglin and placed him under arrest. 1RP 20-21.

Sawyer went to talk to Montes-Gomez. She, her two sons, and her daughter were in the house. Montes-Gomez and her children speak

Spanish and understand only limited English.<sup>2</sup> Both Johnson and Sawyer testified that they speak very little Spanish, and communication with Montes-Gomez was difficult. IRP 22, 33, 38. Her children seemed to understand more English than she did and provided some translation. IRP 23.

Montes-Gomez testified that she told Sawyer that the man in her house was wearing a blue cap and a jacket. The officer then told her, “Oh, we already got him.” IRP 49. Sawyer brought Montes-Gomez into the street to identify Anglin, the man they had in custody. IRP 22. Montes-Gomez noticed that Anglin was wearing a brown jacket. When the officer asked her if that was the suspect, she said “I think so, because he’s wearing the same clothes that he had once inside the house.” IRP 50. Montes-Gomez also testified that she had been told the man confessed. IRP 55-56. When one of the officers brought items recovered from Anglin’s backpack to ask Montes-Gomez if they were hers, she told him they were not. The officer then told her Anglin said he had been inside the house. IRP 56.

Although neither officer remembered specifically telling Montes-Gomez that they had caught the man who broke into her house or that he had confessed, they had no way of knowing what had been relayed to her

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<sup>2</sup> Montes-Gomez testified through a certified Spanish-language interpreter. IRP 43.

in Spanish by her children. 1RP 22-23, 29, 39, 42. According to Sawyer, he told Montes-Gomez that they had someone in custody and asked her to come outside to see if it was the man who had been in her house. 1RP 39. Johnson testified that Montes-Gomez made an identification of the clothing but did not recognize Anglin's face. 1RP 23-24. Sawyer testified that Montes-Gomez was able to say that the stocking cap and brown coat were identical to what the burglar had been wearing, but she did not see the man's face. 1RP 40.

Montes-Gomez testified that after she identified Anglin, she discovered that some silverware was missing from her dining room table. The next day she also discovered that an empty toolbox and a stereo were missing from the garage. 1RP 58-59. The officers searched Anglin and his backpack incident to the arrest. 1RP 20-21. They determined that nothing in Anglin's possession belonged to Montes-Gomez or was associated with her residence. 1RP 24, 28, 40. The missing items were not recovered. CP 20.

At the close of evidence, defense counsel moved to suppress Montes-Gomez's identification of Anglin. Counsel argued that because Montes-Gomez understood the officers to have told her they had caught the guy, the identification procedure was unduly suggestive and admission of the evidence violated Anglin's right to due process. 1RP 62-63.

The court acknowledged that Montes-Gomez's testimony differed from the officers' as to what she had been told. It ruled that even if the police had said something suggestive, there was no indication Montes-Gomez was influenced by it because she did not make an identification. Finding that Montes-Gomez's testimony was only that the hat and coat were the same, the court denied the motion to suppress. 1RP 64-65.

C. ARGUMENT

ADMISSION OF THE UNRELIABLE OUT-OF-COURT  
IDENTIFICATION BASED ON THE IMPERMISSIBLY  
SUGGESTIVE PROCEDURE VIOLATED ANGLIN'S RIGHT  
TO DUE PROCESS

Suggestive identification procedures potentially violate due process because they increase the likelihood of misidentification. Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); State v. Johnson, 132 Wn. App. 454, 458, 132 P.3d 767 (2006). Evidence of identification should not be admitted at trial if the circumstances of the pre-trial confrontation were so infected by suggestiveness as to give rise to a substantial likelihood of misidentification. Neil v. Biggers, 409 U.S. at 198.

1. **Montes-Gomez testified that she identified Anglin at the showup based on his clothing.**

The court below denied Anglin's motion to suppress the out-of-court identification, finding that Montes-Gomez had not identified Anglin, only his clothing. 1RP 64; CP 20. This finding is contradicted by Montes-Gomez's testimony. She explained at trial that when the officer asked her if Anglin was the man who had been in her house, she said she thought it was, because he was wearing the same clothes. 1RP 50. Contrary to the court's finding, she did not merely identify the clothing. She identified Anglin, based on the clothing he was wearing, even though she admitted she had not seen the burglar's face.<sup>3</sup>

A similar identification was suppressed in Johnson. There, a man was robbed by three young men. The victim did not get a good look at the robbers' faces, but he was able to describe their clothing to the police. Police took the victim for a showup identification, and he identified the suspects as the men who robbed him only from their clothing. The trial court suppressed this identification, although the victim was permitted to identify the defendant's jacket in court. Johnson, 132 Wn. App. at 456-57.

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<sup>3</sup> Johnson and Sawyer testified that Montes-Gomez identified Anglin's clothing, but she had not seen the man's face. 1RP 23-24, 40. The inconsistency with Montes-Gomez's testimony is likely explained by the communication difficulties they had that night. Nonetheless, evidence that Montes-Gomez identified Anglin was clearly presented at trial through her testimony.

By contrast, in State v. King, 31 Wn. App. 56, 639 P.2d 809 (1982), the police drove the defendant to the scene of the robbery for a witness identification. The victim walked around the patrol car looking at the defendant. He was unable to recognize the defendant's face or physical characteristics, but he did recognize the defendant's jacket. King, 31 Wn. App. at 59. Because the witness identified only clothing and not the defendant, admission of that evidence did not violate due process. The due process safeguards designed to ensure the reliability of identification evidence apply only to identification of a person. Although identification of the jacket linked the defendant to the crime, that linkage was only circumstantial, and the evidence was properly presented to the jury. Id. at 60-62.

Here, unlike King, Montes-Gomez identified Anglin, not just his clothing, providing direct evidence that he committed the crime. Due process requires that such evidence be suppressed if the suggestiveness of the identification procedure creates a substantial likelihood of misidentification. Neil v. Biggers, 409 U.S. at 198.

**2. The out-of-court identification should have been suppressed**

When a defendant challenges admission of an out-of-court identification, he must show that the identification procedure was

impermissibly suggestive. Once that burden is met, the court must consider whether the circumstances of the identification created a substantial likelihood of misidentification. Neil v. Biggers, 409 U.S. at 198; State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002).

The identification procedure used in this case was impermissibly suggestive. Showup identifications are not per se impermissibly suggestive, and one conducted shortly after the crime is committed in the course of a prompt search for the suspect is permissible. State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986). Nonetheless, single-suspect showups are suggestive “because the very act of showing the witness one suspect indicates that the police have focused their attention on that person,” and the practice has been widely condemned. State v. Hanson, 46 Wn. App. 656, 666, 731 P.2d 1140, review denied, 108 Wn. App. 1003 (1987); Rogers, 44 Wn. App. at 515.

The identification procedure in this case was compromised not only by the inherent suggestiveness of the single-suspect showup, but also by the officers’ muddled communication with Montes-Gomez. When Montes-Gomez described the man who had been in her house to Officer Sawyer, she understood his response to be that the police had already caught the man and that he had confessed. CP 19. Sawyer then took her outside to look at Anglin, and she identified him as the burglar. A

comment by the police that they had already caught the burglar in effect tells the witness, “This is the man” to identify. See State v. McDonald, 40 Wn. App. 743, 744, 746, 700 P.2d 327 (1985) (witness tentatively identified defendant when, after lineup, officer told him defendant had been arrested for crime. Identification procedure held impermissibly suggestive). Montes-Gomez’s understanding that the police were convinced of Anglin’s guilt before she identified him renders the identification procedure impermissibly suggestive.<sup>4</sup> See, e.g., State v. Nettles, 81 Wn.2d 205, 210, 500 P.2d 752 (1972) (police should not, by words or actions, indicate a “favored” suspect); Foster v. California, 394 U.S. 440, 443, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969) (by repeated use of unfair identification procedures, police in effect told witness “this is the man.”); Simmons v. United States, 390 U.S. 377, 383, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) (chance of misidentification heightened if police indicate they have other evidence suspect committed crime); Velez v.

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<sup>4</sup> While the trial court found that the officers did not tell Montes-Gomez they had caught the suspect, it also found that she understood the officers to be saying they had caught the man who had been in her house. CP 19. It is clear that the witness’s perception, rather than the officer’s conduct, is determinative. Admissibility of identification evidence turns on the reliability of the identification, and the circumstances surrounding the identification are crucial. Manson v. Brathwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State v. Linares, 98 Wn. App. 397, 401, 989 P.2d 591 (1999), review denied, 140 Wn.2d 1027 (2000). When an impermissibly suggestive procedure is used, due process requires exclusion of the evidence only if the court finds under the totality of the circumstances that the identification is unreliable. Vickers, 148 Wn.2d at 118. If the officers’ conduct was the focus, there would be no need for the second step of the analysis. Evidence would be excluded solely on the basis that the police used an impermissibly suggestive procedure.

Schmer, 724 F.2d 249, 251 (1<sup>st</sup> Cir. 1984) (identification procedure unnecessarily suggestive where police showed suspect to witnesses with statement, “This is him, isn’t it?”).

When the defendant establishes that an impermissibly suggestive identification procedure was used, the court must determine whether, under the totality of the circumstances, the resulting identification was unreliable. McDonald, 40 Wn. App. at 746. The “corrupting effect of the suggestive identification” is to be weighed against factors indicating reliability, including (1) the opportunity of the victim to observe the subject at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy of the witness’ prior description, (4) the level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation. Id. (citing Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)).

Application of these factors to the circumstances in this case compels the conclusion that Montes-Gomez’s identification was unreliable. Only the final factor weighs in favor of reliability. The police located Anglin in front of Montes-Gomez’s house about ten minutes after her son called the police. Although the precise timing of events is not clear from the record, it appears that the police apprehended Anglin and displayed him to Montes-Gomez within a relatively short time.

Montes-Gomez's testimony demonstrates that she had very little opportunity to observe the burglar at the time of the crime, however. She testified that she entered her living room around 1:30 in the morning and saw a man walking between the sofas toward the kitchen. She immediately turned on a light, and the man fled through a back door. She never saw the man's face. 1RP 46-48. Moreover, she admitted that she identified Anglin based on his clothing, because she had never seen the suspect's face. 1RP 50. This factor weighs against the reliability of Montes-Gomez's identification. See McDonald, 40 Wn. App. at 747 (witness directly observed suspect for only two to three minutes and was not positive whether suspect had mustache).

Next, Montes-Gomez's attention was not focused solely on the burglar during the brief time that she observed him in her home. Rather, she testified that when she saw someone in her house, she reached for the light switch and then grabbed her son's face and shook it to wake him up. As she was doing that, the burglar moved through her kitchen toward the back door. 1RP 47-48. Montes-Gomez's divided attention weighs against reliability as well.

As to the accuracy of Montes-Gomez's description of the burglar, she did not see the man's face. Moreover, when one of the officers asked her how tall the man was, she told him he was kind of regular; since his

face was down he looked short, but she could see that he was regular, just a little bit tall. IRP 59. It is impossible to judge the accuracy of this vague physical description. Montes-Gomez did describe a thick brown jacket, a baseball cap, and a flashlight. IRP 47. The police officers testified that Anglin was wearing a bulky brown coat and a hat when he was arrested, although they did not agree as to the type of hat. They also saw a flashlight. Neither his clothing nor the flashlight were admitted into evidence or identified in court, however. IRP 66. Because Montes-Gomez was unable to describe any facial features or physical characteristics of the suspect, this factor does not weigh in favor of reliability. See Velez, 724 F.2d at 252 (witnesses described white T-shirt and shaggy hair but unable to describe assailant's age, build, height, weight, skin color, other clothing, or other indicia of appearance).

Finally, Montes-Gomez was not able to positively identify Anglin. She told the officer only that she thought he was the man who had broken into her home, basing that identification on his clothing. IRP 50. Her certainty that Anglin's clothing was similar to the suspect's does not render her identification reliable. A bulky brown coat and a hat are surely commonly-worn items in January. This factor also weighs against reliability.

Given Montes-Gomez's limited opportunity to view the suspect, her divided attention at the time, and her reliance on similar clothing as a basis for the less than certain identification, there is a very real risk that she misidentified Anglin as a result of the impermissibly suggestive identification procedure. Admission of that identification violated Anglin's right to due process. Accordingly, Anglin's conviction should be reversed. See McDonald, 40 Wn. App. at 747-48 (reversing and remanding where identification procedure impermissibly suggestive and identification not otherwise reliable).

D. CONCLUSION

The impermissibly suggestive identification procedure created a very real risk of misidentification, and admission of Montes-Gomez's identification violated Anglin's right to due process. His conviction should be reversed.

DATED this 27<sup>th</sup> day of July, 2006.

Respectfully submitted,



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## APPENDIX

FILED  
SUPERIOR COURT

**SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY**

2006 MAR 31 11:15 AM

COWLITZ COUNTY  
STATE OF WASHINGTON, RONI A. BOOTH, CLERK NO. 06-1-00087-8

Plaintiff,	BY _____	)	FINDINGS OF FACT,
		)	CONCLUSIONS OF LAW, AND
		)	VERDICT FOLLOWING A BENCH
		)	TRIAL
JEREMIAH R. ANGLIN,		)	
		)	
Defendant.		)	

A bench trial was held before the Honorable James Warme on March 17<sup>th</sup>, 2006. After hearing the evidence and arguments of the parties, the Court held the following:

**Findings of Fact**

**I.**

On the night January 12<sup>th</sup>, 2006, Maria Felipa Montes-Gomez was asleep at her home located at 292 17<sup>th</sup> Ave in Longview, Washington. Ms. Montes-Gomez resides at this address with her three children and her boyfriend. This location is in the Highlands neighborhood of Longview, an area with a high crime rate.

**II.**

Around 1:30 a.m., Ms. Montes-Gomez was awakened by a noise coming from her living room. She did not expect her boyfriend to be home at this hour, as he was at work, and went to investigate.

**III.**

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1 X.

2 Officer Jeremy Johnson noticed several streetlights on in the area, and did not have any  
3 difficulty making his way to the residence using the ambient light.

4 XI.

5 As the officer approached the residence, they saw a man straddling a bicycle in front of  
6 the house. This man was holding a flashlight and was attempting to tie a large frame backpack to  
7 the front handlebars of his bicycle. The man had another smaller backpack on his back. The man  
8 was wearing a loose fitting brown coat, dark pants, and a dark colored hat. As the officers  
9 approached, the man shined a small flashlight at them.  
10

11 XII.

12 Officer Johnson ordered the man to stay where he was, the man then asked him why. As  
13 the officers approached, the man turned and began to ride away on his bicycle. The officers  
14 began to run after him on foot.

15 XIII.

16 The foot pursuit ended after a short distance when the large backpack slid down and hit  
17 the front wheel of the bicycle, causing the man to crash. The officers then contacted the man and  
18 attempted to arrest him.

19 XIV.

20 The man struggled briefly, but eventually complied with the officers' commands and was  
21 placed under arrest.

22 XV.

23 This man was identified as Jeremiah R. Anglin, the defendant.

24 XVI.

1 Officer Johnson read the defendant his *Miranda* rights, and asked why the defendant had  
2 fled. The defendant answered that he always runs from the cops. Officer Johnson asked if the  
3 defendant thought he had a warrant for his arrest. The defendant answered that he thought he'd  
4 cleared up his warrants.

5 **XVII.**

6 At the time of his arrest, the defendant did in fact have a warrant for his arrest.

7 **XVIII.**

8 A search of the defendant's backpacks revealed a number of tools, including pry bars, a  
9 screwdriver, wire cutters, and bicycle repair tools. Two bags containing methamphetamine were  
10 found on the defendant's person.

11 **XIX.**

12 After arresting the defendant, Officers Johnson and Sawyer made contact with Ms.  
13 Montes-Gomez. Communication between the parties was difficult, as Ms. Montes-Gomez and  
14 her children speak only limited English, and Officer Sawyer speaks only a small amount of  
15 Spanish.

16 **XX.**

17 During the course of the conversation, Ms. Montes-Gomez understood the officers to be  
18 saying that they had caught the man who had been in her house. She also understood the officers  
19 to have told her the man had confessed to being in her house.

20 **XXI.**

21 Officer Johnson and Officer Sawyer did not tell Ms. Montes-Gomez they had caught the  
22 man that had been in her house, and also did not tell her this man had confessed.

23 **XXII.**  
24  
25

1 The officers brought Ms. Montes-Gomez to where the defendant was secured. There, she  
2 stated she had not seen face of the man inside her house, but that the defendant's clothes matched  
3 those worn by the man.

4 **XXIII.**

5 Officer Sawyer accompanied Ms. Montes-Gomez into her home to check for missing  
6 property. The only property found missing within the home was some silverware that Ms.  
7 Montes-Gomez always has on her kitchen table. This silverware was missing, and the tablecloth  
8 was torn.

9 **XXIV.**

10 None of Ms. Montes-Gomez's property was found on the defendant's person, or in his  
11 backpacks. The silverware was not recovered.

12 **XXV.**

13 After the officers had left, Ms. Montes-Gomez found a metal chair outside her living  
14 room window. While the chair was not hers, she had recently seen it behind the house in the  
15 garbage pickup area.

16 **XXVI.**

17 The next day, Ms. Montes-Gomez checked the detached garage behind her home for  
18 missing items. She found that a stereo and a metal toolbox for a pickup truck were missing. The  
19 lock on the garage door had not worked since Ms. Montes-Gomez had moved in.

20 **XXVII.**

21 The Court finds that on January 12<sup>th</sup>, 2006, the defendant unlawfully entered a dwelling  
22 located at 292 17<sup>th</sup> Ave, Longview, Washington. The defendant did not have permission to enter  
23 the residence.

24 **XXVIII.**

1 The Court finds that at the time of his unlawful entry, the defendant intended to commit a  
2 crime against persons or property within the dwelling.

3 **XXIX.**

4 The Court finds that the defendant was still in front of the residence ten minutes after  
5 fleeing because he had returned to recover his bicycle and backpacks.

6  
7 **Conclusions of Law**

8 **I.**

9 The above-entitled Court has jurisdiction over the parties and the subject matter of this  
10 action.

11  
12 **II.**

13 On January 12<sup>th</sup>, 2006, the defendant unlawfully entered a dwelling other than a vehicle  
14 located at 292 17<sup>th</sup> Ave in Longview, Washington, with intent to commit a crime against persons  
15 or property therein.

16  
17 **Verdict of the Court**

18 The defendant is guilty beyond a reasonable doubt of Residential Burglary, in violation of  
19 RCW 9A.52.025 as alleged in count I of the information.

20  
21  
22 DATED this 31 day of March, 2006.

23   
24 SUPERIOR COURT JUDGE

25 Presented by:

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JAMES B. SMITH, WSBA #35537  
Deputy Prosecuting Attorney

Approved as to form:



THAD SCUDDER, WSBA #20170  
Attorney for Defendant



Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Jeremiah Anglin*, Cause No. 34640-1-II, directed to:

Susan Irene Baur  
Cowlitz Co. Prosecutor's Office  
312 SW First Ave.  
Kelso, WA 98626

Jeremiah Anglin  
DOC# 756492  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326-0769

and the original and one copy to:

Washington State Court of Appeals  
Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402

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BY [Signature]  
DEPILITY

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



Catherine E. Glinski  
Done in Port Orchard, WA  
July 27, 2006