

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
) No. 38660-7
v.)
) STATEMENT OF ADDITIONAL
Augustus Martel Oakley ,) GROUNDS FOR REVIEW
) RAP 10 10
 Appellant.)

I, Augustus Oakley , have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

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Other Cases

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U.S. CONST. AMEND. 14.....Right to Due Process

Statutes

RCW 9A.72.020

RCW 9.94A.602

CrR 4.7(a)(1)(ii)

CrR 4.7(h)(2)

Cr Law VOL. 13a109

ER 801

WPIC 2.10

Blacks Law Dic. Eight Edition(2004)

ASSIGNMENTS OF ERROR

- 1) The trial Court violated Oakley's right under the SIXTH AMENDMENT to the CONSTITUTION of the United States, where Oakley was not allowed to confront witnesses.
- 2) The trial Court abused it's Discretion when it denied the Defense's right to call the Prosecutor as a witness for Impeachment reasons.
- 3) The trial Court errored by entering a Transferred intent rule into the jury instructions.
- 4) The trial Court errored when it denied the defense Motion for Mis-trial, due to the fact that the State withheld Discovery that lead to Ineffective Assistance of Counsel, the right to Due Process and fair trial being denied
- 5) The trial Court errored by not allowing Christopher Lynn's police statement that was used for testimony to be read to the jury.
- 6) The trial Court errored when it denied the Defense's Half Time Motion to Dismiss two assaults in the first degree on the basis of lack of Evidence.

- 7) The trial Court errored in imposing firearm enhancement instructions to the jury, because there was only evidence that would support a Deadly Weapon finding.
- 8) There was Insufficient Evidence for the jury to have found a finding of a Firearm under the definition of WPIC 2.10.
- 9) Defense Counsel failed to Motion to Dismiss because of the fact that the alleged victim, Stephen Lynn openly and admittedly committed Perjury.

STATEMENT OF CASE

On April 14, 2007 Stephen Lynn challenged Mr. Oakley to come to the Lynn's residence for a round of fist-i-cuffs because of a prior incident. RP 1067.

Oakley along with Mr. Taylor pulled up the block from the Lynn's residence and parked the car. RP 1071. Stephen walked to the car with Christopher and Isaiah Lynn and ordered Oakley out the car. RP 1193. As Oakley got out of the car, Stephen, Isaiah and Christopher ran back to their house. Oakley and Taylor also went to the

Lynn's house.

Isaiah, Stephen and Christopher started fighting with Oakley and Taylor. RP 674,675. Neighbors began to come out of their homes. A neighbor ran over to the fight, and it broke up. RP 1101,1101.

Taylor and Oakley left the neighborhood passing back by the Lynn residence. There were lot's of neighbors outside as Taylor and Oakley drove away. RP 611,988,1046.

CONFRONTATION CLAUSE

The SIXTH AMEND. right's of accused to confront witnesses against him or her is fundamental right made obligatory on states by the Fourteenth Amendment. U.S.C.A. CONST. AMEND. 6,14. Smith v. Illinois, 390 U.S. 129 at 748.

A leading U.S. SUPREME Court case states that the denial of the right to cross-examine is a Constitutional error of the first magnitude and no amount of showing want of prejudice will cure. Davis v. Alaska, 415 U.S. at 315. Brookhart v. Janis, 384 U.S. at 1,3,.

Oakley was convicted of second degree assault with a firearm enhancement against Isaiah Lynn. There was never any testimony heard from Isaiah. RP 1337,1338.,

nor was there any police statement's made by Isaiah.

Was Oakley's right's under the SIXTH AMEND. to the U.S. Constitution violated by not letting him effectively confront(cross-examine) Isaiah Lynn, yet still being convicted of a charge against him?

Oakley asks the Court of Appeals to vacate the judgment and sentence because of a known violation of his Constitutional right's.

SIXTH AMEND. RIGHT TO CROSS-EXAMINE

In State v. Stiltner, the Washington Supreme Court reversed the defendants conviction for robbery because the trial Court erred when it refused to allow the defendant to call the prosecutor as a witness. 61 Wn.2d 102,377 P.2d 252.

In the Stiltner case the Court of Appeal observed that "The defendant in a criminal trial has the right to prove his defense in the best manner available to him; the trial prosecutor is a competent witness; his testimony must be relevant and material to the theory of the defense. See, State v. Lee, 203 S. Ct. 536."

The prosecutor informed the defense counsel after an interview with Christopher Lynn, that Christopher had not stated any contradicting statements in reference

to the Discovery. RP 713.

Christopher was interviewed off the record by the defense during trial. RP 712., and revealed some staggering new information to which the defense knew nothing about, in regards to witnesses and events that was alleged to have happened.

Christopher told the defense that he told the same story, with the new information and contradicting statements to the prosecutor two weeks prior in a interview. RP 718. The prosecutor denied that Christopher ever made such statements to him that he did to the defense.

The defense wanted to call the prosecutor to the stand to ask him a few questions about Christopher Lynn, but was denied by the trial Court. RP 730,731.

The trial Court must necessarily acknowledge that Christopher had major credibility issues and should have allowed for the defense to call the prosecutor to testify regarding the credibility of the alleged victim.

Did failure to permit the defendant to elicit significant evidence regarding Christophers's credibility deny the defendants Constitutional right to prove his defense?

The trial Court apparently intended to permit Oakley's case to go to the jury, without permitting Oakley the opportunity to put before the fact finder, evidence that the witness, Christopher, apparently recalls a lengthy and detailed conversation with the prosecutor that the prosecutor denies occurred and that the trial Court believes did not occur.

Oakley asks the Court of Appeals to reverse and vacate all of the charges against him on the basis that the trial Court: abused its discretion when it denied the defense to call the prosecutor as a witness; 2. not allowing the defendant the right to cross-examine a witness against him; and 3. for not allowing the defendant the right to prove his defense.

All are violations of the 14 AMEND. right to due process and a fair trial.

TRANSFERRED INTENT

In the case of State v. Clinton, it addresses transferred intent as being when a person tries to injure a person and infact injures another. It also requires that the person who the intent transferred to is a victim of a actual battery. 606 P.2d 1240; Wash. App. 400

In the case of State v. Mark S. Wilson, Wislon made threats to kill two females in a bar. Wilson left the bar then fired shot's into the bar hitting two other men. Wilson was charged with four first degree assault's. 863 P.2d 116; 71 Wash. App. 880.

This is a correct usage of transferred intent, because Wilson was trying to shoot the two females but instead shot two bystanders.

There was only testimony of a weapon being pointed at Stephen Lynn and only Stephen by his testimony. RP 1139,1140. The other alleged victim testified to only seeing sparks coming from a hand that was straight up in the air. RP 655.

There was never any testimony, what so ever from Isaiah Lynn, so he would all together be out of the statue of any intent.

All-in-all none of the alleged victims ever sustained any injury's from a battery, so there cannot possibly be any transferred intent if there wasn't nothing to be transferred.

Did the trial Court err by entering a transferred intent instruction to the jury?

Oakley asks that the Appeal Court reverse and vacate the charges of second degree assault on Isaiah and

Christopher Lynn, because there was no evidence of any intent to be transferred or any intent that was transferred.

FIREARM ENHANCEMENT

According to jury instruction 12, a firearm is a weapon or device from which a projectile or projectiles may be fired by an explosive, such as gun powder. Statute 9.94A.602 states that a malfunctioning gun can still support a deadly weapon enhancement.

According to WPIC 2.10. and 9.94A.602, the weapon in Oakley's case is not a firearm because it did not work, it required something to be done to it to render it operable.

Did the trial Court err when it imposed firearm enhancement rules to the jury, knowing that the weapon that was found was incapable of being fired?

Oakley asks the Appeal Courts to reverse all firearm enhancements and remand for resentencing, under deadly weapon enhancement, because of the wrongful enhancement.

IMPEACHMENT

Under ER 801, a police statement is not hearsay if the declarant testifies at trial and is subject to cross-examination about what's been said concerning the statement

In State v. Schawn Cruze, the Court of Appeals found that the statement of a witness should be read to the jury. 98 Wash. App. 1054(2000).

After Christopher Lynn's police statement was introduced as a exhibit and used for testimony, the defense asked that the statement be read to the jury.

The trial Court denied the defense's move to have Christopher's statement read to the jury because, the state and trial Court felt that police statements are hearsay. RP 924.

According to ER 801 should the trial Court have let Christopher's police statement, be read to the jury?

HALF TIME MOTION

According to Blacks Law Dic. Eighth Edition(2004) insufficient evidence is evidence that is inadequate to prove or support a finding of something.

Christopher Lynn testified to being half a block away from where he saw a gun pulled on Stephen Lynn. RP 654,

746.

Stephen Lynn testified that Oakley pointed the gun directly at him only, not at Isaiah or Christopher Lynn. Rp 1139,1140.

There was never any testimony that Isaiah Lynn ever saw a gun or sparks, or anything else that might have been a result of an assault in the second degree, with a weapon.

There is no evidence that Isaiah or Christopher Lynn were ever assault by a weapon.

Oakley asks the Court of Appeals to respectfully dismiss and vacate the charges against Isaiah and Christopher Lynn.

MIS-TRIAL MOTION

According to CrR 4.7 (a)(1)(ii), the state has a mandatory obligation to disclose any written or recorded statements and the substance of any oral statements of such witnesses.

CrR 4.7 (H)(2), states that "if a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their Counsel of the existance of such additional material, and if the additional material or information is discoverd during trial, the court shall also be notified."

In Hughes v. Johnson, it was found that "a defendant's right to due process is violated when, upon request for exculpatory evidence, the government conceals evidence that is both favorable to the defendant and material to the defendant's guilt or punishment" 191 F3d 607 (5th Cir. (1999)). See Brady v. Maryland, 373 U.S. 83 at 1194 (1963).

On September 10, 2008 the defense moved the trial Court for a mis-trial, due to a discovery violation by the State. RP 711.

About two weeks prior to September 10, 2008 as part to case preparation, defense Counsel Corey had asked the prosecutor after he interviewed Christopher Lynn if Christopher had given an additional information or any contradicting information.

The State in response, repeatedly assured defense Counsel that Christopher had made only statements that were consistent with the discovery and that he had not absolutely contradicted himself. RP 713.

When the defense asked Christopher some questions off record, because the court declined for it to be done on record. RP 712., the statements that Christopher made were materially different from the statements in the discovery and also informed the defense of the existence of new witnesses.

Some of the staggering new material that Christopher revealed to the defense, was that:

- 1) Neither Christopher, Isaiah or Stephen Lynn came within 20-30 feet to Oakley or Oakley's car. RP 715. (which is totally different from Stephen's police statement where claims are made to getting within 3 feet to Oakley and car). RP 1074.
- 2) Oakley got out of the car with a gun. RP 715. (though Christopher never states in his police statement that Oakley ever had a gun). RP 654, 655.
- 3) Christopher heard a second crackle sound when he was running home. (though he never talk's about hearing a crackle or seeing a spark or even alleging that any weapon was at all fired a second time when he was running home in his police statement). RP 716.

These are just some examples, of the new information that was revealed to the defense, that Christopher was absolutely adamant that he had told the prosecutor. RP 718.

Had the state disclosed the new and contradicting statements from Christopher, to the defense, "the defense would have done additional investigation and

conducted different cross-examinations of some of the witnesses who already testified. RP 714.

This is a case with a firearm, where the testimony of witnesses who observed the lack of shooting is absolutely critical to the defense of the case and this was withheld.

The withholding of discovery is a serious matter in this case. It's not discovery that was withheld regarding an inconsequential or collateral matter. This is discovery statements made by an eyewitness to the case and the statements that Christopher gave to the defense.

The withholding of discovery prevented the defense Counsel from effectively assisting Oakley. Defense Counsel was unable to properly prepare, to do a effective investigation and cross-examine. 711, 712, 713, 714, 715, 716 717, 718, 719, 720.

Has Oakley's right to due process denied because, the prosecutor concealed discovery/evidence that was material to his case?

Oakley asks the Court of Appeals to vacate all charges because of violations of due process and fair trial rights because of the states decision to withhold discovery.

INEFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim of ineffective assistance of Counsel, Counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. State v. Aho, 137 Wn.2d at 745.

Deficient performance is when, the failure to object, permitted the defendant to be convicted of a crime he or she could not have committed under facts presented by the state. Id., at 745.

A person commits first degree perjury when, in any official proceeding he or she makes a materially false statement which he or she knows to be false under oath required or authorized by law. RCW 9A.72.020.

"It is fundamentally unfair for the state to knowingly use perjured testimony to convict a defendant; such a verdict must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury". In re Personal Restraint of Benn, 134 Wn.2d 868, 936-37, 952 P.2d 116(1998).

When Stephen Lynn was asked under oath, if he gave his police statement to the best of his ability, and

that he signed it under the penalty of perjury, and answered yes. RP 1190-99,1200-02.

Stephen perjures himself by testifying that there was never a successful shot fired by Oakley. RP 1139, 1140,1142,1143. When Stephen was asked, if he ever stated that Oakley had shot 4-5 shot's, he said that "he had never told anyone that". RP 1143,1191. Then, after Stephen had read his police statement, he said that it states that "Oakley shot 4-5 shot's at him". RP 1194.

Stephen testified that, Oakley got out of the car with a gun, concealed, in his jacket sleeve then, quickly pulled it out. RP 1086,1087,1133,1134. Then, after reading his police report, Stephen states that his report say's that "Oakley hopped out the car with the gun in his right hand in plain view". RP 1193.

Stephen states in the defendants 105 interview that, he could only see the top of the gun to the trigger when the gun was out the window. RP 1244. Stephen contradicts this statement by testifying in Court that Oakley was hanging out the car window, waist up with the gun pointed straight up in the air, in front of all the neighbors, under the street light. RP 1174.

He then later testifies that, "the gun wasn't out the window". RP 1256. Then later states, that it was out the window. RP 1264.

These are clear contradictory testimony's against Stephen's police statement, signed under perjury and are clear acts of first degree perjury.

In State v. Darell Everybodytalksabout, the trial Court granted a mistrial because, after the state rested it's case, the trial court discovered that the state's principle witness had committed perjury. No. 53570-6-I Wash. App. Div.1 at 19(2006).

Oakley's counsel was ineffective because, there was very clear evidence that Stephen Lynn had committed perjury, but defense Counsel did not move the trial Court for a dismissal, mistrial or even object to preserve the issue so that it could be taken up in the Court of Appeals.

Oakley asks the Court of Appeals to reverse and remand for a new trial, because of the ineffective assistance of Counsel.

CONCLUSION

Oakley's three firearm enhancement should be reversed and remanded for resentencing because, the WPIC 2.10 definition of a firearm does not fit the

criteria of the weapon admitted in trial.

Assistance of Counsel was ineffective from, Counsel not moving the trial Court for a dismissal on the basis of a key witness knowingly interjecting the Court with perjured testimony. This lead to Oakley being convicted by perjured testimony.

The trial Court errored when it gave a transferred intent instruction to the jury because, there was no evidence of anyone ever being injured or assaulted by battery, thus, there can not be any battery transferred.

The trial Court errored when it denied the defense's half time motion to dismiss the charges against Isaiah and Christopher Lynn because of, the lack of evidence that pertained to either Isaiah or Christopher, ever being assaulted or battered by a weapon.

The trial Court violated Oakley's SIXTH AMEND. right to confrontation when, Oakley was denied the opportunity to confront or effectively cross-examine Isaiah Lynn.

The trial Court violated Oakley's SIXTH AMEND. right to effectively cross-examine, by not allowing the defense to call the prosecutor to the stand for

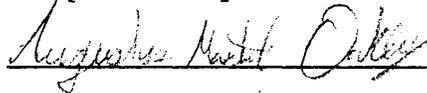
impeachment reasons of challenging the credibility of Christopher Lynn.

The state violated Oakley's due process and fair trial right's by withholding discovery from the defense.

Oakley asks the Court of Appeals to vacate all charges against him. for the many violations against his U.S. Constitution right's.

DATED: November 21, 2009

Respectfully Submitted,



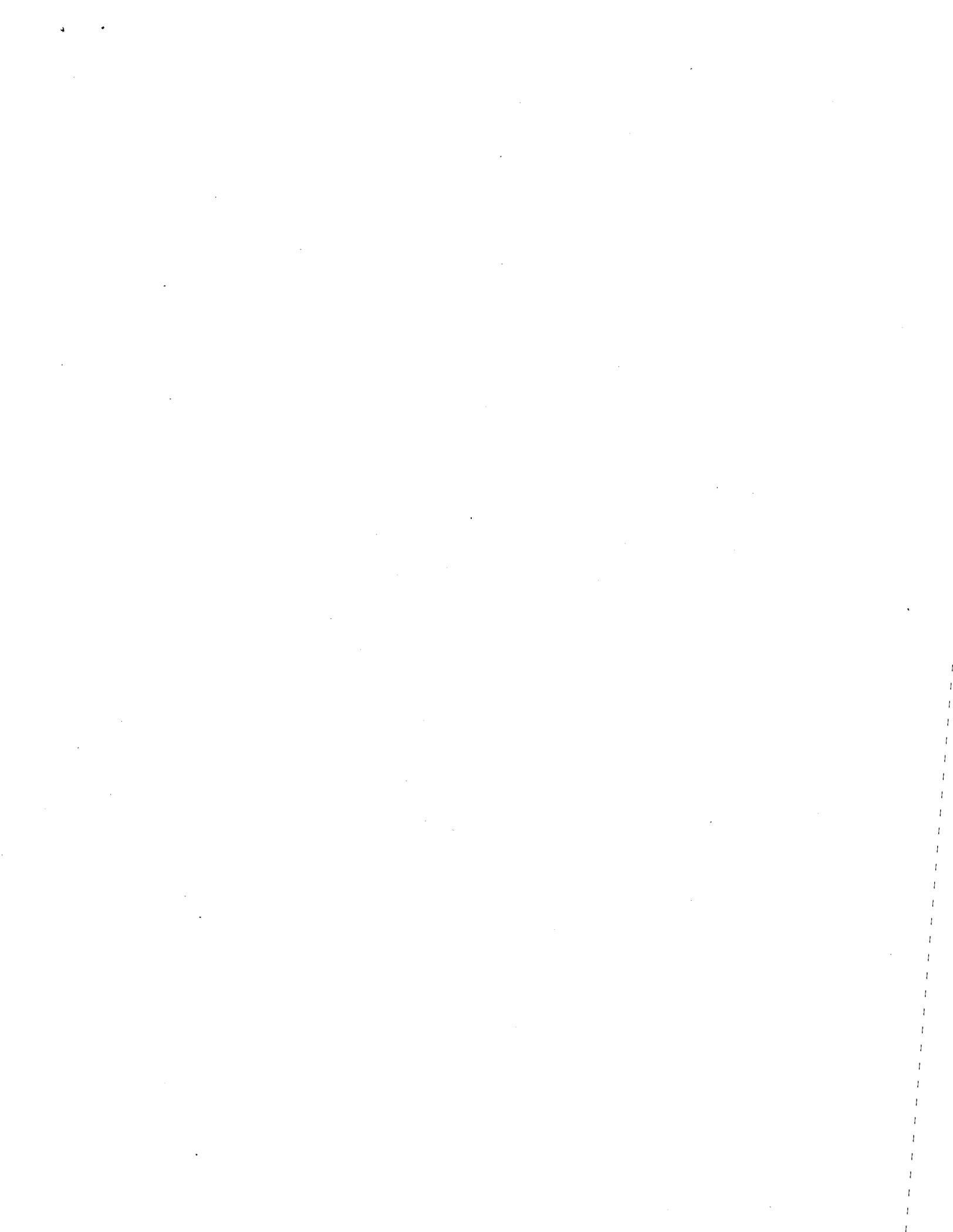
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COURT OF APPEALS
PIERCE COUNTY

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STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF SERVICE BY MAIL

This is to certify and state under the penalty of perjury under the laws of the State of Washington that I have mailed a true and correct copy of the following document(s):

Additional Grounds for Appeal

By depositing in the United States mail, marked *Legal Mail*, postage prepaid, on this 21st day of November, 2009 to the following: Pierce County
Prosecuting Office, Division II Court of Appeals
Rebecca Bouchey (Appellant Attorney)

Respectfully Submitted

Augustus M. Oakley
Signature

Augustus M. Oakley Doc # 325978
Printed/Typed Name

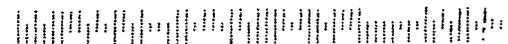
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