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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 39160-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID C. DICKJOSE,

Appellant

REPLY BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County
Cause No. 07-1-06241-8
The Honorable James R. Orlando, Presiding Judge

James A. Schoenberger
WSBA No. 333603
Attorney for Appellant
1008 Yakima Ave. Ste. 201
Tacoma, Washington 98405
253.444.3111

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I. ISSUE PRESENTED

1. Does the complaint for the warrant establish the credibility of the informant where independent police investigation corroborated only innocuous facts provided by the informant and the informant never contacted Mr. Dickjose directly?
2. Does the complaint for the warrant establish the credibility of Mr. Gross as a “middleman” where the complaint contains no facts from which Mr. Gross’ credibility may be inferred?
3. Does the complaint for the warrant contain sufficient facts to create a nexus between the drug sales being investigated and Mr. Dickjose’s residence, buildings, and vehicles sufficient to establish probable cause to search those areas?
4. Is the trial court’s failure to enter proper findings of fact a moot issue?

II. ARGUMENT

1. **The information contained in the search warrant is insufficient to establish the credibility of either the informant or Mr. Gross.**

- a. *The confidential informant.*

The State argues that the first controlled buy established both the informant’s and Mr. Gross’ credibility. State’s Response, p. 20. Specifically, the State argues that the following facts, contained in the complaint for the search warrant, establish the credibility and basis of knowledge of the confidential informant: (1) the declaration states the informant has known Mr. Dickjose for several years and knows he deals

methamphetamine; (2) the informant told officers that Mr. Dickjose had recently purchased a vehicle and was able to provide an accurate description of that vehicle; and (3) the informant told officers he was going to purchase methamphetamine from Mr. Dickjose through a middleman, Mr. Gross, and did, in fact, purchase methamphetamine from Mr. Gross after Mr. Gross was observed meeting with Mr. Dickjose. State's Response Brief, p. 18-20. The State's argument fails.

Mr. Dickjose acknowledges that independent police investigation can be considered to corroborate the credibility of the informant and the reliability of the information. *State v. Jackson*, 102 Wn.2d 432, 433, 688 P.2d 136 (1984). However, "[t]he police investigation must corroborate the informant's suggestions of criminal activity, **and not merely verify innocuous details**, commonly known or public facts, or predictable events." *State v. Atchley*, 142 Wn.App. 147, 163, 173 P.3d 323 (2007) (emphasis added), *citing State v. Jackson*, 102 Wn.2d 432, at 438, 688 P.2d 136 (1984).

The complaint for the warrant indicates that the only information the informant gave police prior to the first controlled buy was Mr. Dickjose's address, a description of a truck Mr. Dickjose recently purchased, and the informant's assertions that the informant had known Mr. Dickjose for several years and knew that Mr. Dickjose sold

methamphetamine. Independent police investigation corroborated Mr. Dickjose's address and that Mr. Dickjose had, in fact, recently purchased the truck described by the informant. However, independent police investigation did not corroborate that Mr. Dickjose dealt methamphetamine or that the informant had known Mr. Dickjose for years. Thus, the independent police investigation corroborated only innocuous information and was, therefore, insufficient to establish the credibility of the informant.

At best, the initial controlled buy conducted by the police using the informant established only that the informant could purchase methamphetamine from Mr. Gross. The initial and subsequent controlled buys only involved Mr. Dickjose tangentially. The police investigation and controlled buys establish, at best, that Mr. Gross dealt drugs and that Mr. Dickjose was an acquaintance of Mr. Gross. The police investigation did not corroborate the informant's claims that Mr. Dickjose was a methamphetamine dealer. Therefore, the police investigation did not corroborate the credibility of the informant. Because the complaint contains no other facts from which the informant's credibility can be inferred, the complaint contains insufficient facts to establish the credibility of the informant.

b. *Mr. Gross.*

The State asserts that the initial controlled buy established the credibility of Mr. Gross. State's Response, p. 20. Citing *State v. Mejia*, 111 Wn.2d 892, 766 P.2d 454 (1989), the State also asserts that Mr. Gross' credibility is not governed by the *Aguillar-Spinelli* credibility test because Mr. Gross acted as a "middleman" for the drug transactions. State's Response, p. 17-18. The State's argument fails and *Mejia* is factually distinguishable from this case.

In *Mejia*, police working with an anonymous informant conducted two controlled buys from a third individual who acted as the "middleman" between the informant and the supplier. *Mejia*, 111 Wn.2d at 893-895, 766 P.2d 454. At each controlled buy, the informant met with the middleman at a pre-arranged location, the middle man would leave and be followed directly to Mejia's residence, and would return to the informant and give the informant drugs. *Mejia*, 111 Wn.2d at 893-895, 766 P.2d 454. During the second controlled buy, the middleman told the CI that the CI had brought so much business to the dealer then the dealer had given the middle man a quantity of cocaine as a bonus. *Mejia*, 111 Wn.2d at 896, 766 P.2d 454. The middleman also told the CI that the supplier had so much cocaine that the supplier used a fruit picking bucket to break the cocaine into powder. *Mejia*, 111 Wn.2d at 896, 766 P.2d 454.

Based on the middleman's statements and acts of going directly to Mejia's residence without stopping and returning to the CI with drugs, police obtained a warrant to search Mejia's residence. *Mejia*, 111 Wn.2d at 894-896, 766 P.2d 454. The police discovered 1.5 pounds of cocaine and arrested the occupants of the house, including Mejia. *Mejia*, 111 Wn.2d at 896, 766 P.2d 454. Mejia's motion to suppress the cocaine at trial was denied and Mejia was convicted of possession of cocaine with intent to deliver. *Mejia*, 111 Wn.2d at 896, 766 P.2d 454.

The *Mejia* court held that the affidavit for the search warrant satisfied the *Aguilar-Spinelli* test and established the credibility of the confidential informant since the affidavit included the information that the informant had completed four prior successful controlled buys for the police and had given information to police regarding drug trafficking that had been independently verified by the police. *Mejia*, 111 Wn.2d at 893-897, 766 P.2d 454.

The *Mejia* court divided the information police obtained from the middleman into two categories: (1) the statements made by the middleman to the informant; and (2) the non-verbal "communication" to the police through his conduct, specifically not handing over the cocaine immediately upon receipt of money from the informant, travelling directly to Mejia's house, travelling back to the informant, and only then giving

the informant the cocaine. *Mejia*, 111 Wn.2d at 897-898, 766 P.2d 454.

The *Mejia* court held that the *Aguilar-Spinelli* test applied to the verbal statements of the middleman. *Mejia*, 111 Wn.2d at 897, 766 P.2d 454. However, with regards to the information communicated through the non-verbal conduct of the middleman, the *Mejia* court held that the conduct was not intended to be a “statement” and, therefore, the *Aguilar-Spinelli* test did not apply to it. *Mejia*, 111 Wn.2d at 897-900, 766 P.2d 454. Thus, the *Mejia* court held that the judge who issued the search warrant for Mejia’s residence “could properly consider the police’s firsthand observation of the middleman’s conduct for its probative value in determining probable cause.” *Mejia*, 111 Wn.2d at 900, 766 P.2d 454.

In sum, *Mejia* establishes that where police obtain information from a “middleman,” such as Mr. Gross, the *Aguilar-Spinelli* tests apply to information obtained through the verbal communication from the middleman but do not apply to information derived from the non-verbal “communication” of the middleman. *Mejia*, 111 Wn.2d at 897-900, 766 P.2d 454.

i. Mr. Gross’ verbal communications.

Here, like the middleman in *Mejia*, Mr. Gross provided police with information in two manners: his verbal statements to the informant and his actions. Mr. Gross’ credibility is at issue since it is his hearsay statements

to the informant which affirmatively link Mr. Dickjose to the transport and sale of methamphetamine: during the first buy, the informant told police that Mr. Gross called Mr. Dickjose and said he wanted a half ounce of methamphetamine and Mr. Dickjose agreed and said he was in the area; during the second buy, the CI told police that Mr. Gross had told the CI that he was going to meet with Mr. Dickjose and then meet the CI back at Mr. Gross' residence; during the third controlled buy, Mr. Gross told the CI that he had again called Mr. Dickjose and asked for a half-ounce of methamphetamine and Mr. Dickjose responded that he was in the area and later Mr. Gross told the CI that he had called Mr. Dickjose and Mr. Dickjose indicated that he was on his way. State's Response, p. 3-7.

However, under *Mejia*, for the issuing magistrate to be lawfully be able to consider the statements made by Mr. Gross to the informant, the complaint for the warrant would set forth sufficient facts about Mr. Gross to satisfy the *Aguillar-Spinelli* credibility and basis of knowledge tests. *Mejia*, 111 Wn.2d at 898, 766 P.2d 454 (“Since these words were the words of the unknown middleman and only relayed to the police through the informant, special attention must be paid to the middleman's involvement to ensure his reliability.”)

The complaint for the search warrant contains no facts regarding Mr. Gross' credibility. Further, independent police investigation only

corroborated the innocent facts reported by Mr. Gross, such as the fact Mr. Dickjose was in the area. Thus, the complaint contains insufficient facts to satisfy the *Aguilar-Spinelli* credibility test and the issuing judge could not properly rely on the statements made by Mr. Gross in determining whether probable cause existed to issue the warrant for Mr. Dickjose's property.

Further, the only source for the statements of Mr. Gross was the confidential informant. In *Mejia*, the court found that the court could trust the informant's representations of what the middleman had told the informant since the affidavit in *Mejia* established that informant's credibility. *Mejia*, 111 Wn.2d at 894, 897, 766 P.2d 454 (informant had conducted four successful controlled buys and provided information about drug trafficking in the area which had been corroborated by independent police investigation). Here, the complaint for the warrant contains insufficient evidence to establish the credibility of the informant, therefore the trial court had no reason to believe the informant's report of the statements allegedly made by Mr. Gross regarding Mr. Dickjose.

ii. Mr. Gross' conduct.

During two of the controlled buys, Mr. Gross was seen contacting Mr. Dickjose close in time to when Mr. Gross sold drugs to the informant. State's Response, p. 3-7. During the controlled buy on October 25, 2007,

however, Mr. Gross was not seen contacting Mr. Dickjose. State's Response, p. 4-5. The only basis for concluding that Mr. Gross met Mr. Dickjose on October 25, 2007 is Mr. Gross' statement to the informant that he was going to meet with Mr. Dickjose. State's Response, p. 4-5. However, as discussed above, the complaint for the warrant contains insufficient facts to establish that either the informant or Mr. Gross was credible. Therefore, Mr. Gross' behavior communicated that he contacted Mr. Dickjose on only two of the controlled buys.

Unlike the middleman in *Mejia*, Mr. Gross was not observed going to one particular location each time without deviation. During the first controlled buy, Mr. Gross was seen getting into Mr. Dickjose's pickup. State's Response, p. 3-4. During the third controlled buy, Mr. Gross was seen briefly contacting Mr. Dickjose as Mr. Dickjose drove a Mercedes. State's Response, p. 5-7.

Thus, while the court could consider Mr. Gross' actions in determining if probable cause existed to search Mr. Dickjose's residence, as is discussed below, those actions did not establish a nexus between Mr. Dickjose's residence and any criminal activity.

2. The complaint contains insufficient facts to support the finding of a nexus between the drug sales and Mr. Dickjose's residence, outbuildings, and vehicles to support a finding of probable cause for the search warrant to issue.

As discussed above, the complaint for the warrant contained insufficient facts to establish the credibility of either the informant or Mr. Gross. Thus, none of the statements of the informant or Mr. Gross could be considered in determining whether or not probable cause existed to search Mr. Dickjose's property. As is discussed below, the remaining information contained in the complaint for the warrant is insufficient to establish a nexus between Mr. Dickjose's residence, outbuildings, and vehicles, and any criminal activity sufficient to support a finding that probable cause existed for a search warrant for Mr. Dickjose's property could issue.

a. The facts that Mr. Dickjose was seen leaving and returning to his home do not establish probable cause to search his home for evidence of drug activity.

Citing *State v. G.M.V.*, 135 Wn.App. 366, 372, 144 P.3d 358 (2006), *review denied* 160 Wn.2d 1024, 163 P.3d 794 (2007), the State argues that "it is sufficient [to establish probable cause to search a location for drugs] if the warrant declaration contains information that the dealer left from or returned to a location before or after selling drugs." State's

Response, p. 14, *citing G.M.V.*, 135 Wn.App. at 372, 144 P.3d 358. The State misrepresents the holding of *G.M.V.* and the State's argument is contrary to established Washington Law.

In *G.M.V.*, police made several controlled buys from G.M.V.'s live-in boyfriend, Mr. Longoria. *G.M.V.*, 135 Wn.App. at 369-370, 144 P.3d 358. Police observed Mr. Longoria leave G.M.V.'s house, travel to meet the confidential informant, sell drugs to the informant, and then return directly to G.M.V.'s house. *G.M.V.*, 135 Wn.App. at 369-370, 144 P.3d 358. Police obtained a warrant, raided the home, and discovered 817 grams of marijuana and a digital scale. *G.M.V.*, 135 Wn.App. at 369-370, 144 P.3d 358. G.M.V. was found guilty of possession of marijuana and appeal. *G.M.V.*, 135 Wn.App. at 370-371, 144 P.3d 358.

On appeal, G.M.V. argued that her trial counsel was ineffective for failing to challenge the search warrant. *G.M.V.*, 135 Wn.App. at 371, 144 P.3d 358. In support of her contention that counsel was ineffective, G.M.V. cited *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999) and argued that the warrant failed to establish a nexus between Mr. Longoria's drug dealing and G.M.V.'s home. *G.M.V.*, 135 Wn.App. at 371-372, 144 P.3d 358.¹

¹ In *Thein*, the Washington Supreme Court specifically rejected the argument that "it is reasonable to infer evidence of drug dealing will likely be found in the homes of drug dealers." *Thein*, 138 Wn.2d at 147. The *Thein* court characterized this logic as

Noting that G.M.V. was not challenging the facial validity of the warrant on appeal, Division III of the Court of Appeals found that G.M.V.'s trial counsel was not ineffective since the court concluded that a challenge to the warrant would have failed at the trial court level. *G.M.V.*, 135 Wn.App. at 372, 144 P.3d 358. The G.M.V. court concluded that a challenge to the search warrant at trial would have failed because the *G.M.V.* court believed that the facts that Mr. Longoria left from and returned to G.M.V.'s home before and after he sold the drugs "was a nexus that established probable cause that Mr. Longoria had drugs in the house." *G.M.V.*, 135 Wn.App. at 372, 144 P.3d 358. The *G.M.V.* court distinguished the facts of *G.M.V.* from *Thien* because, in *Thein*, the

warrant to search a drug dealer's home was based solely on evidence of drug activity elsewhere. But the affidavit supporting [the] warrant [to search G.M.V.'s house] did not rely on generalized beliefs about the habits of drug dealers as in *Thein*. The warrant was to search the place Mr. Longoria left from and returned to before and after he sold drugs. This was a nexus that established probable cause that Mr. Longoria had drugs in the house.

G.M.V., 135 Wn.App. at 372, 144 P.3d 358.

First, the discussion of what facts constitute probable cause for a warrant to issue in *G.M.V.* was *dicta*. The issue before the court was whether or not G.M.V. received ineffective assistance of counsel, not

"conclusory predictions" and ruled that "[b]lanket inferences of this kind substitute generalities for the required showing of reasonably specific 'underlying circumstances.'" *Thein*, 138 Wn.2d at 147, 977 P.2d 582.

whether or not the warrant to search her home was lawfully issued. “Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.” *DCR, Inc. v. Pierce County*, 92 Wn.App. 660, 683 n. 16, 964 P.2d 380 (1998), *review denied* 137 Wn.2d 1030, 980 P.2d 1283 (1999), *cert. denied* 529 U.S. 1053, 120 S.Ct. 1553, 146 L.Ed.2d 459 (2000). Thus, the language of *G.M.V.* cited by the case was not the holding of the case and need not be followed.

Second, *G.M.V.* is a decision of Division III of the Court of Appeals. As such, it is merely persuasive authority and is not binding on this court. *See State v. Schmitt*, 124 Wn.App. 662, 669 n. 11, 102 P.3d 856 (2004) (Decisions of a division of the Court of Appeals are not binding on other divisions of the Court of Appeals).

Third, the conclusion of the *G.M.V.* court was wrong and contrary to controlling Washington law. The distinction drawn by the *G.M.V.* court between the facts of *G.M.V.* and the facts of *Thein* is without merit. The Washington Supreme Court in *Thein* made clear that probable cause to search a drug dealer’s residence for evidence of drugs or drug dealing must be based on independent evidence specifically linking the home to drugs or drug dealing *aside from the fact that the suspected drug dealer lives there*. *Thein*, 138 Wn.2d at 146-151, 977 P.2d 582.

In *G.M.V.*, the facts that Mr. Longoria was seen leaving his residence and returning to his residence before and after he sold drugs to the informant established nothing more than the fact that Mr. Longoria lived at that residence. It goes without saying that a drug dealer will leave his home during any given day and eventually return to that home. *Thein* stands for the proposition that, without any further evidence of drug related activity occurring in a certain location, the fact that a drug dealer lives at that certain location is an insufficient to establish probable cause to search that location. The conclusion of the *G.M.V.* court is simply wrong and would likely have been reversed had that case been reviewed by the Washington Supreme Court.

Finally, even assuming, *arguendo*, that the holding of *G.M.V.* is an accurate statement of the law, *G.M.V.* is factually distinguishable from this case. In *G.M.V.*, the individual who actually sold the drugs to the confidential informant was seen leaving and returning to his residence immediately prior and following the transaction. Here, Mr. Dickjose was not seen leaving and returning to his residence immediately prior to and following the sales of drugs to the informant by Mr. Gross.

The complaint for the warrant contains no information regard when Mr. Dickjose left his home in relation to the first controlled buy. The complaint does indicate that police followed Mr. Dickjose for several

hours after the first controlled buy before Mr. Dickjose returned to his residence. State's Response, p. 3-4.

During the second controlled buy, Mr. Dickjose was not seen leaving his home or meeting with Mr. Gross. The closest the complaint comes to tying Mr. Dickjose's departure and arrival at his home to the second controlled buy is the statement that Mr. Dickjose "returned to his residence in a time consistent with meeting up with Gross." State's Response, p. 5.

At the third controlled buy, it is unknown when Mr. Dickjose left his home that day, but he did return to his home shortly after the controlled buy occurred. State's Response, p. 5-7.

Thus, Mr. Dickjose's pattern of departure from and return to his home relative to the controlled buys is not as indicative of a relation between his residence and the drug transaction as were the actions of Mr. Longoria in *G.M.V.*

In sum, the State cites *dicta* in *G.M.V.* which is contrary to established Washington Supreme Court precedent and which was dealing with an issue not present in this appeal. Further, *G.M.V.* is factually distinguishable from this case and would not control this court's decision even if the *dicta* cited by the State was a correct statement of the law of Washington. The fact that Mr. Dickjose left his home and was observed

returning to his home on the dates of two of the controlled buys does not establish a sufficient nexus between Mr. Gross selling drugs to the informant and Mr. Dickjose's residence to support a conclusion that probable cause existed to search Mr. Dickjose's residence, outbuildings, and vehicles for evidence of drug-related crimes.

b. The complaint for the warrant contains insufficient facts independent of Mr. Gross' and the informant's statements to support the issuance of a warrant to search Mr. Dickjose's property.

Absent the statements of the informant and Mr. Gross that Mr. Dickjose was involved dealing drugs, the complaint for the warrant contains no facts linking Mr. Dickjose to the delivery or sale of drugs, and even less evidence creating a nexus between Mr. Dickjose's residence, outbuildings and vehicles with any drug-related activity. Accordingly, the trial court erred in denying Mr. Dickjose's motion to suppress.

c. Even if the statements of the informants are considered, the complaint still contains insufficient evidence to create a nexus between Mr. Dickjose's residence and any criminal activity.

As stated above, the fact that a suspected drug dealer lives at a certain location is insufficient evidence to establish probable cause to issue a search warrant for drug-related evidence at that location. At best, the facts contained in the complaint for the warrant are sufficient to support an inference that Mr. Dickjose delivered drugs to Mr. Gross and probable

cause existed to search the Mercedes and the pickup truck Mr. Dickjose was observed driving when he met Mr. Gross. However, the complaint contains no facts linking Mr. Dickjose's residence to any criminal activity, therefore the facts contained in the complaint are insufficient to establish the necessary nexus between Mr. Dickjose's residence, outbuildings, and other vehicles to any drug-related activity.

3. The "deficiencies" in the trial court's Findings of Facts are not moot and require remand to have them vacated as exceeding the trial court's authority.

The State misstates the law regarding the role of the trial court when reviewing the lawfulness of a search warrant and the requirement that the trial court enter findings of fact following a motion to suppress.

Citing *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008), the State argues that a trial court hearing a motion to suppress evidence pursuant to CrR 3.6 on grounds that a search warrant was issued without probable cause is not required to enter findings of fact because the trial court "sits as a court of review, in what is analogous to an appellate function." State's Response, p. 26. The State argues that, since the trial court was sitting as a court of review, the trial court is not acting as a fact-finder and should not make findings of fact. State's Response, p. 26. The State's argument misinterprets the pertinent language of *Neth*.

In *Neth*, the court was discussing what evidence a trial court could

consider in determining whether or not sufficient probable cause existed for a search warrant to have issued. The actual language of the *Neth* decision was, “at the suppression hearing the trial court acts in an appellate-like capacity; its review, like ours, is limited to the four corners of the affidavit supporting probable cause.” *Neth*, 165 Wn.2d at 182, 196 P.3d 658. Thus, the *Neth* court’s discussion of the trial court acting in an “appellate-like capacity” was in reference to what evidence a trial court could consider in determining whether probable cause existed, not whether or not a trial court is required to enter findings of fact when making a probable cause determination.

As the State points out, Mr. Dickjose brought his motion to suppress under CrR 3.6. State’s Response, p. 26. CrR 3.6(b) requires the court to enter written findings of fact and conclusions of law following an evidentiary hearing on a motion to suppress. While no evidentiary hearing was held in this case, the State saw fit to draft, and the trial court saw fit to sign, findings of fact and conclusions of law. As pointed out in Mr. Dickjose’s Opening Brief, the trial court entered findings of fact which were tantamount to findings of guilt and therefore invaded the province of the jury. If, as the State argues, no findings of fact were necessary and the findings entered by the trial court had “no force or effect either in the context of the determination of the suppression hearing, or in any other

aspect of the case” (State’s Response, p. 28), then it would have been better for the State to decline to draft any such findings and for the trial court to decline to enter them.

The “deficiencies” of the findings of fact entered by the trial court are not moot since the language of the findings as drafted by the State and the fact that the findings were even entered indicates, at best, a misunderstanding of CrR 3.6 and the scope of the decision being made by the trial court at the suppression hearing, and, at worst, an attempt by the State to put findings of fact in the record which could potentially prejudice a defendant on appeal. As the State, the party who drafted the findings, is undoubtedly aware, an unchallenged factual finding is treated as a verity on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

This court should address this issue in order to clarify to all parties involved, including the trial court, the proper scope of the trial court’s decision on a motion to suppress and the proper scope of the findings a trial court may enter regarding a motion to suppress.

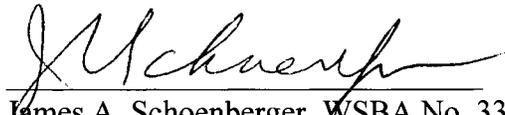
III. CONCLUSION

For the above stated reasons, there was insufficient evidence to support the trial court’s findings that probable cause existed to issue a warrant to search Mr. Dickjose’s residence and other property. This court should reverse the trial court’s ruling and remand for suppression of all

evidence found pursuant to the search warrant.

DATED this 19th day of April, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Schoenberger', written over a horizontal line.

James A. Schoenberger, WSBA No. 33603
Attorney for Appellant Dickjose

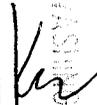
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 19th day of April 2010, I delivered a true and correct copy of the Petition for Discretionary Review to which this certificate is attached, by email, to the following:

Kit Proctor, Deputy Prosecuting Attorney
Marcus Miller, Deputy Prosecuting Attorney
Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 19th day of April 2010.



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